TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1925

No. [redacted] 223

Andrew W. Mellon
~~JAMES C. DAVIS~~, AGENT AND DIRECTOR GENERAL OF RAILROADS, PETITIONER,

vs.

ABRAHAM WEISS, ADMINISTRATOR OF THE ESTATE OF NATHAN NOMINSKY

ON A WRIT OF CERTIORARI TO THE MUNICIPAL COURT FOR THE CITY OF BOSTON, STATE OF MASSACHUSETTS

PETITION FOR CERTIORARI FILED DECEMBER 12, 1924

CERTIORARI GRANTED JANUARY 26, 1925

(30,736)

(30,736)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 771

JAMES C. DAVIS, AGENT AND DIRECTOR GENERAL OF RAILROADS, PETITIONER,

vs.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE MUNICIPAL COURT OF THE CITY OF BOSTON, STATE OF MASSACHUSETTS

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 8, 1925

[fol. 1] **IN MUNICIPAL COURT OF CITY OF BOSTON**

JUDGE'S CERTIFICATE TO CLERK

I, Wilfred Bolster, Chief Justice of the Municipal Court of the City of Boston, in said County and Commonwealth, do certify, that William F. Donovan, Esquire, whose signature is affixed to the papers hereunto annexed, is Clerk of said Court, within and for the County of Suffolk, for civil business, and hath the keeping of the files, records, and proceedings of said Court, within and for said County, for civil business; Also of the files, records, and proceedings of the late Justices' Court of the County of Suffolk, and of the late Police Court of the City of Boston, for civil business, in the County and Commonwealth aforesaid; that he is, by Law, the proper person to make out and to certify copies of the files, records, and proceedings of said several Courts; that full faith and credit are and ought to be given to his acts and attestation done as aforesaid; and that his attestation to the paper hereunto annexed is in due form.

In testimony whereof, I have hereunto set my hand, and caused the seal of the said Municipal Court of the City of Boston, to be hereunto affixed, this ninth day of December, in the year of our Lord one thousand nine hundred and twenty-four.

Wilfred Bolster, Chief Justice of the Municipal Court of the City of Boston. (Seal of the Municipal Court of the City of Boston.)

[fol. 2] IN MUNICIPAL COURT OF CITY OF BOSTON

CLERK'S CERTIFICATE TO JUDGE

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

I, William F. Donovan, Clerk of the Municipal Court of the City of Boston, holden at said Boston, within our County of Suffolk, for civil business, do certify, that Wilfred Bolster, Esquire, whose signature is affixed to the Certificate hereto annexed, is, and was at the time of affixing said signature, Chief Justice of the said Municipal Court of the City of Boston, duly commissioned and qualified as such, and acting at the time in his official capacity and that full faith and credence are, and ought to be given to his Acts and Attestations done as aforesaid, and that his signature to the Certificate annexed, is genuine.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Municipal Court of the City of Boston, at Boston aforesaid, this ninth day of December, in the year of our Lord one thousand nine hundred and twenty-four.

William F. Donovan, Clerk. (Seal of the Municipal Court of the City of Boston.)

[fol. 3] IN MUNICIPAL COURT OF THE CITY OF BOSTON

ABRAHAM WEISS, Admr.,

vs.

JAMES C. DAVIS, Agent

CLERK'S CERTIFICATE

I, William F. Donovan, Clerk of the Municipal Court of the Municipal Court of the City of Boston, for Civil Business, do hereby certify that the annexed are true copies of the papers on file in the above entitled action, together with a certified copy of the docket entries in said action; a certificate of judgment; and a certified copy of the opinion of Supreme Judicial Court for the Commonwealth.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at said Boston, this ninth day of December, in the year of our Lord one thousand nine hundred and twenty-four.

William F. Donovan, Clerk. (Seal of the Municipal Court of the City of Boston.)

[fols. 4 & 5] IN MUNICIPAL COURT OF CITY OF BOSTON

WRIT OF ATTACHMENT AND SHERIFF'S RETURN

To the sheriffs of our several counties or their deputies or any constable of any city or town within our said Commonwealth, Greeting:

We command you to attach the goods or estate of New York, New Haven & Hartford Railroad Company, a corporation established according to law, and having a usual place of business in Boston, in our County of Suffolk, to the value of seven hundred ($700) dollars, and summon the said defendant (if it may be found in your precinct) to appear before our Justices of the Municipal Court of the City of Boston, to be holden at Boston, within our County of Suffolk, for civil business, on Saturday, the thirty-first day of May, A. D., 1919, at nine of the clock in the forenoon; then and there to answer to Nathan Nominsky, plaintiff, in an action of contract or tort, to the damage of the said plaintiff (as he says) the sum of seven hundred ($700) dollars, as shall then and there appear, with other due damages. And have you there this writ with your doings therein.

Witness Wilfred Bolster, Esquire, at Boston aforesaid, the fifteenth day of May, in the year of our Lord one thousand nine hundred and nineteen.

William F. Donovan, Clerk. (Seal.)

A true copy. Attest: William F. Donovan, Clerk.

SUFFOLK, ss:

Boston, May 22, 1919.

By virtue of this writ, I this day attached a chip as the property of the within named defendant corporation, New York, New Haven & Hartford Railroad Company, and afterwards on the same day summoned it to appear and answer at court as within directed, by delivering to T. W. Hoogs, the Secretary to its President, and the officer in charge of its business a summons together with an attested copy of this writ.

(Signed) Joseph P. Silsby, Deputy Sheriff.

Fees:

Service	1.00
Copy	.50
Travel	.10
	$1.60

[fol. 6] IN MUNICIPAL COURT OF THE CITY OF BOSTON

[Title omitted]

MOTION TO AMEND WRIT AND ORDER ALLOWING SAME—Filed Jan. 23, 1922

And now comes the plaintiff after rescript from the Supreme Judicial Court, but before final judgment and moves for leave to amend his writ and declaration in the above entitled cause by substituting for the present defendant, the N. Y., N. H. & H. R. R. Co. as a defendant, James C. Davis, Agent and Director General of Railroads, to wit,—New York, New Haven & Hartford Railroad Co., appointed by the President of the United States of America by proclamation under section 206 A of the Transportation Act, 1920, and upon such substitution the above entitled cause be restored to the trial list.

By his attorneys, (Signed) J. W. Keith, Benjamin Rabalsky.

Notice mailed, postage prepaid to A. W. Blackman, Esq., Attorney, for the defendant, Jan. 14, 1922.

(Signed) J. W. Keith.

Filed and allowed Jan. 23, 1922.

A true copy. Attest: William F. Donovan, Clerk.

[fol. 7] IN MUNICIPAL COURT OF CITY OF BOSTON

SUMMONS AND SHERIFF'S RETURN

To the sheriffs of our several counties or their deputies or any constable of any city or town within our said Commonwealth, Greeting:

Whereas Nathan Nominsky, plaintiff, has sued out a writ before our Justices of the Municipal Court of the City of Boston, holden at said Boston, within said County of Suffolk, for civil business, against New York, New Haven & Hartford Railroad Company, a corporation established according to law and having a usual place of business in Boston, in our County of Suffolk, defendant, which has been duly served and entered in said Court:

And whereas the said plaintiff has moved the said Court for leave to amend its writ and declaration in said action by inserting therein the name of James C. Davis, Agent and Director General of Railroads, to wit, New York, New Haven & Hartford Railroad Co., and that the said James C. Davis be summoned in to said Court, to answer thereto,—which said motion has been allowed.

You are hereby commanded to summon the said James C. Davis (if he be found in your precinct) to appear before our Justices of the Municipal Court of the City of Boston, to be holden at said Boston, within said County of Suffolk, for civil business on Saturday, the eleventh day of February, A. D. 1922, at nine of the clock in the forenoon, by serving him with a true and attested copy hereof seven days at least before the eleventh day of February, that he may then and there appear and answer to the said Nathan Nominsky touching the matters in said declaration and herein set forth.

Hereof fail not, and make due return hereof, with your doings herein.

Witness Wilfred Bolster, Esquire, at Boston, the twenty-fifth day of January, in the year of our Lord one thousand nine hundred and twenty two.

(Signed) Volney D. Caldwell, Asst. Clerk. (Seal of the Municipal Court of the City of Boston.)

A true copy. Attest: William F. Donovan, Clerk.

Officer's Return

SUFFOLK, ss:

Boston, January 30th, 1922.

I this day summoned the within named James C. Davis, Director as within described, to appear and answer at court as within directed by delivering to T. W. Hoogs, Esq., Chief Clerk to its President and the officer in charge of the business of the New York, New Haven & Hartford Railroad Company, his agent, an attested copy of this precept.

(Signed) Richard F. Sweeney, Deputy Sheriff.

Fees:

Service	$1.00
Copy	.50
Travel	.10
	$1.60

[fol. 8] IN MUNICIPAL COURT OF THE CITY OF BOSTON

[Title omitted]

MOTION OF J. W. KEITH TO BE ADMITTED AS A PARTY PLAINTIFF—Filed April 23, 1923

And now comes Abraham Weiss, and says that the plaintiff Nathan Nominsky died on or about December 18, 1922, and that your petitioner has been appointed administrator of the estate of the said Nathan Nominsky.

Wherefore he prays that he may be admitted as a party plaintiff to prosecute the above entitled suit.

By his attorney, (Signed) J. W. Keith.

A true copy. Attest: William F. Donovan, Clerk.

[fol. 9] IN MUNICIPAL COURT OF THE CITY OF BOSTON

[Title omitted]

Report to Supreme Judicial Court—Filed May 16, 1923

This is an action of contract or tort ad damnum $500 begun by writ dated May 15, 1919, against The New York, New Haven and Hartford Railroad Company, a Massachusetts corporation.

The plaintiff's declaration is a- follows:

DECLARATION

"Count 1. And the plaintiff says that the defendant on or about November 23, 1918, was a common carrier of goods and chattels; that on or about November 23, 1918, one Louis Cutler entered into an agreement with the defendants whereby the defendants agreed to convey to New York bales of compressed rags, which were to be delivered by the defendants to the plaintiff at New York.

Count 2. And the plaintiff agreed to pay the defendants a reasonable freight in accordance with the charges for the carriage of said merchandise; that the defendants became by law bound and obliged as common carriers aforesaid and by their bill of lading undertook

and promised to take care of and safely convey the said goods and deliver the same as aforesaid, but the said defendants did not take care of and securely convey and deliver the said goods, but in breach of its agreement have only failed to deliver said goods up to date hereof, and the goods were not accounted for; that the plaintiff is the assignee of the consignor, Louis Cutler, and by reason of the failure to deliver the goods in accordance with the bill of lading, the plaintiff suffered damages.

Count 3. And the plaintiff says that the defendants received bales of compressed rags the property of the plaintiff, and agreed with [fol. 10] the plaintiff for a consideration to deliver same at place of destination in accordance with the bill of lading, but the defendants neglected to deliver the same and now fail to account for the same. All to the plaintiff's great damage."

The answer was a general denial.

Following the coming down of the rescript from the Supreme Judicial Court in this case, the decision in which is reported 239 Mass. 254, the plaintiff on January 14, 1922, filed a motion for leave to amend his writ and declaration—

LEAVE TO AMEND WRIT AND DECLARATION AND ORDER ALLOWING SAME

"by substituting for the present defendant The N. Y., N. H. & H. R. R. Co. as a defendant James C. Davis agent and director general of railroads, appointed by the President of the United States of America by Proclamation under Section 206 A of the Transportation Act, 1920."

Said motion was allowed and thereafter, to wit, January 25, 1922, a process called a summons was issued to James C. Davis therein described as agent and director general of railroads directing said Davis to appear in said court on Saturday, February 11, 1922.

Thereafter, on February 13, 1922, said Davis appeared by counsel who filed an appearance as follows:

"The Clerk will please enter my special appearance for the defendant Davis for the purpose of contesting jurisdiction.

A. W. Blackman, Atty., Appearing Specially."

and also on said date filed a motion to dismiss as follows:

MOTION TO DISMISS AND ORDER OVERRULING SAME

"Now comes James C. Davis, Agent and Director General, defendant herein appearing specially for the purpose of this motion, and without consenting to the jurisdiction of this Court, and moves that the service of the writ summoning said defendant to appear and answer be set aside and that this action as against him be dismissed upon the following grounds:

1. That this Court is without jurisdiction to entertain this action against the above named defendant.

2. That the issuance and service of said writ summoning the above named defendant to appear and answer are null and void because in violation of and in conflict with the laws of the United States.

[fol. 11] 3. That this proceeding against the above named defendant was not instituted within the time prescribed by the laws of the United States.

4. That this action as against the above named defendant was not instituted in the manner provided by the laws of the United States.

5. That the provisions of the General Laws of said Commonwealth, under authority of which the above named defendant was summoned as party defendant in this action, so far as they purport to authorize the proceedings herein, are repugnant to the laws of the United States, and, therefore, said proceedings are null and void and without authority of law.

6. That it appears from the record of the return on the writ herein issued to the above named defendant that no service of said writ was made upon the above named defendant in accordance with the provisions of the laws of Massachusetts, and, therefore, such service is null and void.

Wherefore the above named defendant says that he should not be held to answer herein, that the service of the writ herein should be set aside, and that this action as against him should be dismissed.

James C. Davis, Agent and Director General of Railroads, by his attorney, appearing specially for the purpose of this motion."

Thereafter, on April 23, 1923, said motion to dismiss was heard by Creed, J. and overruled, to which ruling of the court said defendant duly filed a request for a report.

Order Admitting Abraham Weiss as Party Plaintiff

On said April 23, 1923, on motion made by Abraham Weiss, on suggestion of the death of said original plaintiff, Nathan Nominsky, said Weiss as Administrator of the estate of said Nominsky was admitted as party plaintiff to prosecute the above entitled suit.

Subsequently, to wit, on April 28, 1923, the Defendant Davis filed an answer as follows:

Answer

"Now comes the defendant Davis in the above entitled action, appearing specially through counsel to contest the jurisdiction of this court over him, and not waiving but relying upon his motion to dismiss heretofore filed in this action and for answer says:

1. That this court is without jurisdiction to entertain this action against the above named defendant for the reasons more fully set forth in defendant's said motion to dismiss.

[fol. 12] 2. And further answering the defendant denies each and every allegation in the plaintiff's writ and declaration contained.

3. And further answering the defendant says that the plaintiff's interstate was as appears by the declaration in this action, assignee of an alleged claim of one Louis Cutler; that plaintiff's alleged title and right against this defendant, if any there be, is derived from said alleged assignment; that the plaintiff's said claim is a claim upon the United States; that under section 3477 of the Revised Statutes of the United States said assignment is absolutely null and void.

James C. Davis, by his attorney, appearing specially to contest jurisdiction."

Agreed Statement of Facts

Thereafter, on May 11, 1923, said action was reached for trial before me and was submitted by the parties upon an agreed statement of facts and attached exhibits as follows:

"In this cause it is hereby agreed to by counsel that the plaintiff is administrator of the estate of Nathan Nominsky;

That said Nominsky became assignee of a certain claim as shown by the assignment attached hereto and marked Exhibit 1;

That said assignor Louis Cutler on or about August 5, 1918, bought certain Blue Worsted for capping costing him $371;

That said Cutler shipped the same to Rose & Company of Brooklyn, N. Y., for processing, which was done and for which said Cutler paid $35;

That the freight charge paid on the shipment to Brooklyn was $2.85, and was the lawful charge which would have been paid on the return movement of the freight;

That on November 21, 1918, said Rose & Company delivered said Worsted, in good order, and after said processing, to the Brooklyn Eastern District Terminal, a corporation acting as a carrier of freight, and connecting with various railroads running out of New York City and Brooklyn, for transportation to said assignor, said Louis Cutler;

That said Brooklyn Eastern District Terminal issued to the shippers a negotiable or order bill of lading, the original of which is attached hereto, marked Exhibit 2;

That said freight was delivered in due course to the railroad of The New York, New Haven, and Hartford Railroad Company, at that time being operated by the United States Railroad Administration;

[fol. 13] That on December 7, 1918, said United States Railroad Administration mailed to said Louis Cutler a letter or notice, a copy of which is attached hereto, marked Exhibit 3; that the statements made therein were true;

That said Louis Cutler duly filed claim for the value of said worsted, which was never delivered to nor received by him;

That at the time said shipment from Brooklyn was made, namely, November 21, 1918, the carriers involved, including the United States Railroad Administration, operating the Brooklyn Eastern District Terminal, and The New York, New Haven and Hartford Railroad, had published, posted, and duly filed with the Interstate Commerce Commission, and there was in effect, tariffs or schedules of rates, charges, and the like, which prescribed the form of the bill-of-lading which should be used, and that one provision of the bill-of-lading as so prescribed, provided that

'Suits for loss, damage, or delay shall be instituted only within two years and one day after delivery of the property, or, in case of failure to make delivery, then within two years and one day after a reasonable time for delivery had elapsed.'

That a reasonable time for the delivery of the shipment in question was not later than the early part of December, 1918;

That the freight in question never has been delivered to said Cutler or his assignee;

That said Cutler became in due course the holder of the original bill-of-lading, Exhibit 2."

DEFENDANT'S REQUESTED INSTRUCTIONS TO JURY

At the same time, the defendant submitted requests as follows:

"The defendant appearing specially through counsel to contest the jurisdiction of this court, and not waiving but relying upon his motion to dismiss heretofore filed in this action, and not waiving but relying upon his answer heretofore filed in this action, requests the court to give the following requests or rulings of law:

1. That this court is without jurisdiction to entertain this action against the above named defendant.

2. That the action against this defendant was not begun prior to the issuance of a summons directed to this defendant dated January 25, 1922.

3. That under the defendant's tariffs and schedules of rates one of the terms and conditions of the contract between the parties was that in case of loss or damage to the property any action brought to recover must be brought within two years and one day after a reasonable time for delivery of the property had elapsed.

[fol. 14] 4. That the action against this defendant was not in fact brought nor begun until long after two years and one day had elapsed after a reasonable time for delivery of the property.

5. That the plaintiff's action as against this defendant was not begun within the time required by the terms and conditions of the contract between the parties, and said action is, therefore, barred.

6. That under the provisions of General Order 50 and the Transportation Act of 1920, the action as originally begun was improperly brought.

7. That under the provisions of General Order 50 and the Transportation Act of 1920, the court has no power to substitute in an action brought against the corporation the representative of the United States Railroad Administration as party defendant.

8. That the claim of one Louis Cutler which was assigned to plaintiff's intestate, was a claim not against the United States Railroad Administration but a claim against the New York, New Haven and Hartford Railroad Company.

9. That if the said assignment to the plaintiff's intestate be treated as an assignment of Cutler's claim against the United States Railroad Administration, nevertheless, said claim is a claim against the United States, and under Section 3477 of the Revised Statutes of the United States said assignment is null and void and the plaintiff can not recover thereon in this action."

PLAINTIFF'S REQUESTED INSTRUCTIONS TO JURY

The plaintiff duly submitted requests as follows:

"The plaintiff requests the Court to rule as matter of law

1st. A bill of lading covering this shipment is required by the Hepburn Act and Carmack amendment.

2. Such bill of lading constitutes the contract between the shipper and the consignee.

3. Proof of delivery to initial carrier, and failure to deliver to the consignee raises presumption of negligence creating liability for the loss or damage caused thereby.

4. That the provisions of Section 3477 Rev. Sts. U. S. are not a bar to this action.

5. That on all the evidence and the law the plaintiff is entitled to recover."

INSTRUCTIONS GIVEN TO JURY

The Court allowed plaintiff's requests numbers 4 and 5, and refused as immaterial plaintiff's requests numbers 1, 2 and 3.

The Court allowed defendant's request number 6, and denied defendant's requests numbers, 1, 2, 4, 5, 7, 8, and 9.

[fol. 15] The Court on the agreed statement of facts found pro forma in contract for the plaintiff.

This report contains all the evidence material to the questions reported.

The defendant claiming to be aggrieved by the rulings and refusals to rule as requested, duly filed a request for report, and I hereby report the same to the Appellate Division for determination.

Abraham K. Cohen, Special Justice. Michael J. Creed, Justice.

EXHIBIT I TO REPORT

Know all men by these presents that I, Louis Cutler, of 270 Rantoul Street, Beverly, County of Essex, and Commonwealth of Massachusetts in consideration of four hundred eighteen, ($418) dollars, to me paid by Nathan Norminsky, of Boston, County of Suffolk, the receipt whereof is herewith acknowledged, do hereby transfer, assign, set over unto the said Nathan Norminsky all my rights, claims, and demands, causes of action that I now have or hold against the New York, New Haven and Hartford Railroad Company, or against any other person, or persons, corporation or corporations for a claim now pending with said railroad arising out of a certain shipment of one bale of rags consigned to me by Rose & Company, Brooklyn, New York, which bale of rags was apparently lost in transit, in accordance with a communication to me on the said Railroad Company dated December 7, 1918, and for which claim I have sent vouchers, bill of lading, original invoices to the N. Y., N. H. & H. R. R. Co., and now pending there under number 2-980971-7.

To have and to hold the same to the said Nathan Norminsky his heirs and assigns forever, and I herewith covenant with the said Norminsky that my claim is a just claim, that the amount of four hundred eighteen, ($418) dollars, claimed from the said railroad is correct in accordance with the losses sustained by me by reason of [fol. 16] failing to deliver to me the said bale of rags in behalf of the railroad; that I will help and assist the said Norminsky to enforce this claim; that I will sign such papers, receipts, and releases as Norminsky may demand from me.

And I herewith appoint and constitute the said Norminsky to be my attorney with irrevocable power to collect the said money from the railroad; to sign checks, receipts, that the railroad may demand, and to sign said in his own name or in my name; and in case of law suit, I will appear in court and render such services as may be required in order to enforce said claim against the railroad.

In witness whereof I, the said Louis Cutler hereunto set my hand and seal this twenty-seventh day of January in the year of one thousand nine hundred and nineteen.

Louis Cutler. (Seal.)

[fol. 16a] EXHIBIT 2 TO REPORT

"Uniform Bill of Lading—Adopted by Carriers in Official Classification Territory Effective June 1, 1916"

New York Central & Hudson River Railroad Co.

United States Railroad Administration, W. G. McAdoo, Director General of Railroads, N. Y. Central & Hudson River R. R. Co.

The above is to be regarded as substituted for the name of N. Y. Central & Hudson River R. R. Company where the same appears in this document.

Order Bill of Lading—Original

Shippers' No. —. Agent's No. —

Received, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading, at Brooklyn, N. Y., 11/21/1918, from Rose & Co. the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The surrender of this original order bill of lading properly indorsed shall be required before the delivery of the property. Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is indorsed on this original bill of lading or given in writing by the shipper.

The rate of freight from —— to ——, is, in cents per 100 lbs.: If — times, 1st; if 1st class, —; if 2d class, —; if rule 25, —; if 3d class, —; if rule 26, —; if rule 28, —; if 4th class, —; if 5th class, —; if 6th class, —; if special, per —; if special, per —.

Consigned to order of Louis Cutler (Mail Address—Not for purposes of delivery).

Destination: Beverly, State of Mass., County of ——.

Notify 1st National Bank, at Beverly, State of Mass., County of ——.

Route: ——. Car initial: ——. Car No.: ——.

No. packages	Description of articles and special marks	Weight (subject to correction)	Class or rate	Check column
.....	One (1) bale rags....	.....	.....	.....

N. Y., N. H. & H. R. R., Brooklyn E. D. Terminal, Nov. 21, 1918. Freight Claim Department. Claim 10167. Brooklyn Eastern District Terminal. L. & D. Claim. E. 980,971-7. N. Y., N. H. & H. R. R.

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $— to apply in prepayment of the charges on the property described hereon. —— ——, Agent or Cashier, per —— ——. (The signature here acknowledges only the amount prepaid.)

Charges advanced: $—.

Rose & Co., Shipper, per J. C. F. W. Stearns, Agent, per J. W.

(This bill of lading is to be signed by the shipper and agent of the carrier issuing same.)

[fol. 16b] Conditions

Sec. 1. The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damages thereto, except as hereinafter provided.

No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, or the act or default of the shipper or owner, or for differences in the weights of grain, seed, or other commodities caused by natural shrinkage or discrepancies in elevator weights. For loss, damage, or delay caused by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon request of the shipper, owner or party entitled to make such request; or resulting from a defect or vice in the property or from riots or strikes. When in accordance with general custom, on account of the nature of the property, or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence, and the burden to prove freedom from such negligence shall be on the carrier or party in possession.

Sec. 2. In issuing this bill of lading this company agrees to transport only over its own line, and except as otherwise provided by law acts only as agent with respect to the portion of the route beyond its own line.

No carrier shall be liable for loss, damage, or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law, but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed.

Sec. 3. No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market, or otherwise than with reasonable despatch, unless by specific agreement indorsed hereon. Every carrier shall have the right in case of physical necessity to forward said property by any railroad or route between the point of shipment and the point of destination; but if such diversion shall be from a rail to a water route the liability of the carrier shall be the same as though the entire carriage were by rail.

The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment under this bill of lading, including the freight charges, if paid.

Except where the loss, damage, or injury complained of is due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, as conditions precedent to recovery, claims must be made in writing to the originating or delivering carrier within six months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export), or, in case of failure to make delivery, then within six months (or nine months in case of export traffic) after a reasonable time for delivery has elapsed; and suits for loss, damage, or delay shall be instituted only within two years and one day after delivery of the property, or, in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed.

Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance.

Sec. 4. All property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public, or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with

other grain of the same kind and grade without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

The carrier may make a reasonable charge for the detention of any vessel or car, or for the use of tracks after the car has been held forty-eight hours (exclusive of legal holidays), for loading or unloading, and may add such charge to all other charges hereunder and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage.

Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from trains.

Sec. 6. No carrier will carry or be liable in any way for any documents, species, or for any articles of extraordinary value not specifically rated in the published classification or tariffs, unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 7. Every party, whether principal or agent, shipping explosive or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 8. The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Sec. 9. Except in case of diversion from rail to water route, which is provided for in section 3 hereof, if all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations, and exemptions provided by statute and to the conditions contained in this bill of lading not inconsistent with such statutes or this section, and

subject also to the condition that no carrier or party in possession shall be liable for any loss or damage resulting from the perils of the lakes, sea, or other waters; or from explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery, or appurtenances; or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And any vessel carrying any or all of the property herein described shall have the liberty to call at intermediate ports, to tow and be towed, and assist vessels in distress, and to deviate for the purpose of saving life or property.

The term "water carriage" in this section shall not be construed as including lighterage across rivers or in lake or other harbors, and the liability for such lighterage shall be governed by the other sections of this instrument.

If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the provisions of the tariff, which shall be treated as incorporated into the conditions of this Bill of Lading.

Sec. 10. Any alteration, addition or erasure in this bill of lading which shall be made without an indorsement thereof hereon, signed by the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

EXHIBIT 3 TO REPORT

United States Railroad Administration, Director General of Railroads

New York, New Haven and Hartford Railroad, Central New England Railroad, New England Steamship Lines, New Bedford, Martha's Vineyard & Nantucket Steamboat Line

Office of the Freight Claim Agent, South Station

In reply please refer to file M-9214.
Please quote our claim or file number in your reply.

Mr. Louis Cutler, Beverly, Mass.

Boston, Mass., Dec. 7, 1918.

GENTLEMEN: This is to advise you that shipment of 1 Bale Rags 600 lbs. from Rose & Co. N. Y. City Nov. 23 to your order notify First National was involved in accident at East Bridgeport Conn. Nov. 24, 1918 and too badly damaged to go forward, other disposition having been made by this Company. Tfred. enroute to car B. & O. 90472.

[fols. 17-19] Your claim for the lost goods is in order and you are requested to file it direct with this office, observing the following:

1. Quote prominently in your claim, my number.

2. Attach original bill of lading.

3. Attach original invoice or copy thereof. Copy must be certified.

Your careful compliance with the foregoing will expedite the handling and settlement of your claim.

Yours truly, —— ——, Freight Claim Agent.

FINAL ORDER—Filed Sept. 24, 1923

[Title omitted]

Ordered that the Clerk make the following entry under said case in the docket, viz:—Plaintiff's request 4 wrongly allowed—judgment for defendant.

By the Court.

William F. Donovan, Clerk.

PETITION FOR APPEAL—Filed Sept. 27, 1923

And now comes the plaintiff in the above entitled action and claims an appeal from the decision of the Appellate Division of the Municipal Court of the City of Boston, Sept. 24th, 1923, to the Supreme Judicial Court for the Commonwealth.

By his attorneys, J. W. Keith, Benjamin Rabalsky.

Copy. Attest: William F. Donovan, Clerk.

[fol. 20] IN SUPREME JUDICIAL COURT

ABRAHAM WEISS, Administrator,

vs.

JAMES C. DAVIS, Agent and Director General of Railroads

Pending in the Municipal Court of the City of Boston, within the County of Suffolk

JUDGMENT—Sept. 19, 1924

Ordered, That the Clerk of said Court in said County make the following entry under said case in the docket of said Court, viz: Order of Appellate Division reversed. Judgment to be entered for plaintiff.

By the Court.

Walter F. Frederick, Clerk.

Copy. Att.: William F. Donovan, Clerk of the Municipal Court of the City of Boston.

Brief Statement of the Grounds and Reasons of the Decision

The reasons of the decision are set forth at length in the opinion filed with the reporter of decisions, to which reference is made.

[fol. 21] In Municipal Court of the City of Boston

Clerk's Certificate to Judgment

I hereby certify that Abraham Weiss, administrator of the estate of Nathan Nominsky, plaintiff, on the twenty-sixth day of September, A. D. 1924, before our Justices of the Municipal Court of the City of Boston, holden at said Boston, within said County of Suffolk, for civil business, recovered judgment in contract against James C. Davis, Agent and Director General of Railroads, defendant, for the sum of six hundred eighty-three dollars and seventy cents, debt or damage, and sixty-one dollars and forty-two cents, for charges of suit.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at said Boston, this ninth day of December, in the year of our Lord one thousand nine hundred and twenty-four.

William F. Donovan, Clerk. (Seal of the Municipal Court of the City of Boston.)

Judg't date: Sept. 26, 1924.

Dam.	$683.70
Costs	61.42
	$745.12

[fol. 22] In Municipal Court of City of Boston

Docket Entries

Nathan Nominsky (Abraham Weiss, Admr., as Amended)

—

New York, New Haven & Hartford Railroad Company (James C. Davis, Agent & Director General of Railroads, to wit, N. Y., N. H. & H. R. R. Co., as Amended).

Benjamin Rabalsky, J. W. Keith (Dec. 30, '19), J. W. Keith, for Admr.

F. A. Farnham, A. W. Blackman (Dec. 30, '19), A. W. Blackman, for James C. Davis, Agent, Spec.

May 14, 1923. Court finds for Plaintiff in $517.05 in contract. Memo. of rulings filed.
May 11, 1923. Defendant files Request for Report and Draft Report.
May 28, 1923. Report allowed.
June 9, 1923. Copies and briefs filed.
Jun. 15, 1923. Argument on Report. Decision reserved.
Sep. 24, 1923. Opinion and Final Order: "Plaintiff's request 4 wrongly allowed—judgment for defendant.
Sep. 27, 1923. Plaintiff files Claim of Appeal to S. J. C.
Jan. 15, 1924. Appeal perfected by deposit.
Feb. 16, 1924. Copies, etc., delivered to appellant for trans. to S. J. C.
Sep. 20, 1924. Rescript from S. J. C. "Order of Appellate Division reversed. Judgment to be entered for plaintiff.
Sep. 25, 1924. Defendant's motion to continue for judgment filed, heard and denied.
Sep. 26, 1924. Judgment for Plaintiff.
Declaration filed time of entry.
June 3, 1919. Answer filed.
Dec. 30, 1919. Trial—Plff. files requests for rulings.
Mch. 6, 1920. Court finds for deft. Memo. of rulings and findings filed.
Mch. 11, 1920. Plff. files Request for Report.
Mch. 13, 1920. Draft Report filed.
Mch. 16, 1920. Deft. files request to be present at taxation of costs.
May 19, 1920. Report filed and allowed.
May 26, 1920. Copies and briefs filed.
May 28, 1920. Argument on Report. Decision reserved.
Feb. 21, 1921. Opinion and Final Order: Report dismissed.
Feb. 25, 1921. Plff. files Claim of Appeal to S. J. C. Appeal perfected by deposit.
Mch. 17, 1921. Papers and copies delivered to appellant for trans. to S. J. C.
July 1, 1921. Rescript from S. J. C. "Order dismissing the Report affirmed."
July 7, 1921. Plff's motion to continue for judgment filed and allowed.
July 12, 1921. Plff's motion to continue generally for judgment filed and allowed.
Jan. 12, 1922. Motion for judgment filed only.
Jan. 23, 1922. Defendant's Motion for Judgment heard and denied without prejudice.
Jan. 23, 1922. Plaintiff's motion to amend writ and declaration filed, heard and allowed.
Jan. 23, 1922. Notice to defendant, Director General, etc., ordered.
Jan. 25, 1922. Notice to James C. Davis, Agent, etc., issues returnable Feb. 11, 1922.
Feb. 11, 1922. Notice returned.
Feb. 14, 1922. Motion to dismiss filed by defendant, James C. Davis, Agent.

Apr. 23, 1923. Motion to dismiss heard and overruled. Suggestion of death of plaintiff and appointment of Admr., who appears and assumes prosecution of action, filed.
Apr. 25, 1923. Defendant files Request for Report.
Apr. 30, 1923. Answer of Defendant Davis filed.
May 11, 1923. Trial—Plaintiff and Defendant severally file requests for rulings.
May 11, 1923. Agreed Statement of Facts filed.

I hereby certify that the above is a true copy of the docket entries in the action of Abraham Weiss, Admr., vs. James C. Davis, Agent & Director General, etc.

William F. Donovan, Clerk.

Damages	$683.70
Costs	61.42
	$745.12

[fol. 23] IN SUPREME JUDICIAL COURT

[Title omitted]

OPINION—Filed Sept. 20, 1924

Present: Rugg, C. J.; Braley, Crosby, & Pierce, JJ.

RUGG, C. J.:

This is an action begun on May 15, 1919, wherein the New York, New Haven & Hartford Railroad Company was named as defendant. The cause of action arises at common law and not under any statute. It is to recover compensation for the loss of merchandise while in course of transportation by a common carrier. The shipment and loss occurred in November, 1918. A reasonable time for the delivery of the merchandise was not later than early in December, 1918. The case has been before us under the name Nominsky v. New York, New Haven & Hartford Railroad, 239 Mass. 254. It then was decided on June 29, 1921, that the action could not be maintained against that defendant because under the Act of Congress and proclamation of the President the complete possession and control of the railroad was vested in the United States and all actions of this nature were maintainable only against the Director General of Railroads. On January 14, 1922, the plaintiff moved to amend his writ and declaration by substituting James C. Davis, Agent and Director General of Railroads as defendant in place of the defendant originally named. That motion was allowed by the court and on January 25, 1922, process issued summoning Mr. Davis to appear.

[fol. 24] He filed pleadings appropriate to contest the jurisdiction of the court over him.

The defendant argues that it was beyond the power of the court to allow the amendment. This point is concluded against his contentions by the principle of several recent decisions of this court. L. L. Cohen & Co. Inc. v. Director General of Railroads, 247 Mass. 259. Genga v. Director General of Railroads, 243 Mass. 101, 110, 111. Aetna Mills v. Director General of Railroads, 242 Mass. 155. Sack v. Director General of Railroads, 245 Mass. 114, 118. Director General of Railroads v. Eastern Steamship Lines, 245 Mass. 385, 396. It is unnecessary to repeat the reasoning of those decisions, in several of which the subject is discussed at large.

No sound distinction between those decisions and the case at bar can be founded upon the circumstance that the bill of lading issued in accordance with law for the lost merchandise contained the provision that "Suits for loss, damage, or delay shall be instituted only within two years and one day after delivery of the property, or, in case of failure to make delivery, then within two years and one day after a reasonable time for delivery had elapsed." If the present action had been first instituted when the summons issued to Mr. Davis, it would not have been instituted seasonably under the terms of the bill of lading. Under the general practice prevalent in this Commonwealth such amendment is commonly allowed, unless special facts exist rendering it inequitable. No such facts are present in the case at bar. The fact that some limitation would bar a new action and that the claim would be lost if an amendment is not allowed has often been considered an additional reason for allowing an amendment if in other respects permissible. McLaughlin v. West End Street Railway, 186 Mass. 150 and cases there collected. Tracy v. Boston & Northern Street Railway, 201 Mass. 13, 16. Genga v. Director General of Railroads, 243 Mass. 101, 104 and cases there cited. The bill of lading in the case at bar to the ordinary business mind would appear to be issued in the name of the railroad company, although under the law it was issued by the Director Gen-[fol. 25] eral of Railroads. It would be violative of an innate sense of justice to hold that, when action had been instituted seasonably against the railroad company thus appearing on the face of the bill of lading to be liable, the Director General, actually liable on that bill of lading issued by him, could not be brought in as a party defendant by amendment and thus escape all liability. Fundamental rights of parties or rights secured by laws of the United States cannot be jeopardized under the guise of practice or procedure. Davis v. Dantzler Co., 261 U. S. 280. Wabash Railway Co. v. Elliott, 261 U. S. 457. North Carolina Railroad v. Lee, 250 U. S. 16. Davis v. Wechsler, 263 U. S. 22, 24. Commonwealth v. Donnelly, 246 Mass. 507, 509. Questions of amendment of process or pleadings commonly are recognized as practice and not substantive right. Moreover, there is no disposition on the part of courts to exalt a mistake in procedure into an absolute right in contravention of "the moral worth" of a just claim. See Danforth v. Groton Water Co.

178 Mass. 472, 477. We are not aware of any provision of the Acts of Congress or of proclamations or general orders issued pursuant to them, or of any decision of the Supreme Court of the United States, and none has been called to our attention which forbids expressly or by implication the allowance of such an amendment under the conditions here disclosed.

We understand and have decided in the cases already cited that the State practice as to amendments prevails in proceedings in State courts as to enforcement of provisions of the Federal Railroad Control Acts. We hold that there was no error of law in the allowance of the amendment.

The case at bar does not appear to us to be governed by the denial of petitions for writs of certiorari in Fischer v. Wabash Railway Co. 263 U. S. 706 [see 255 N. Y. 568], and in Chrisp v. Davis, 263 U. S. 710 [see 159 Ark. 335]. See also Fahey v. Davis, 224 Mich. 371. Those decisions all seem to be founded upon State practice more or less divergent from that of this Commonwealth.

The case at bar appears to us to be distinguishable from Payne v. Industrial Board of Illinois, 258 U. S. 613, Payne v. Stevens, 260 [fol. 26] U. S. 705, and United States Railway Administration v. Slatinka, 260 U. S. 747, where a different statute was involved and a different principle was controlling.

The question is not presented in the case at bar whether such an amendment could rightly be allowed after February 28, 1922, bringing in as a party defendant the agent designated under § 206 (a) of the Transportation Act of February 28, 1920, c. 91, 41 U. S. Sts. at Large, 461, as amended by the act of March 3, 1923, c. 233, 42 U. S. Sts. at Large, 1443.

The claim here sought to be enforced is to recover compensation for loss of goods destroyed while in the possession of the railroad administration under the control of the Director General as common carrier and in the course of transportation from Brooklyn, New York, to Beverly, Massachusetts. The shipment, according to the bill of lading, was consigned to the order of one Cutler, the owner. Cutler assigned his claim, arising from the loss of the goods while in transit, to one Norminsky, who instituted the present action, now prosecuted by his administrator. The defendant contends that the plaintiff's intestate, having acquired the claim by assignment, cannot prosecute action thereon against the United States of America. That contention is founded on § 3477 of the U. S. Rev. Sts. That section is in these words: "All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or shares thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney,

must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of [fol. 27] the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same."

That section has been before the Supreme Court of the United States for construction in numerous cases. All of them theretofore decided were reviewed and analyzed in Jernegan v. Osborn, 155 Mass. 207, and Thayer v. Pressey, 175 Mass. 225. That ground need not be traversed again. Since those decisions several adjudications touching that section have been made. In Nutt v. Knut, 200 U. S. 12, 20, it was held that a contract between a claimant against the United States for damages founded on appropriation of his property by its officers and his attorney, purporting to give the latter a lien for his services upon the amount to be recovered, was to that extent void under the statute, whose "obvious purpose, in part, was to forbid any one who was a stranger to the original transaction to come between the claimant and the Government, prior to the allowance of a claim, and who, in asserting his own interest or share in the claim, pending its examination, might embarrass the conduct of the business on the part of the officers of the Government." Calhoun v. Massie, 253 U. S. 170, 174. It was said in McGowan v. Parish, 237 U. S. 285, 294, as the result of previous judicial declarations, that "the statute was intended solely for the protection of the Government during the adjustment of claims, and that, after allowance, the protection may be invoked or waived, as they in their judgment deem proper." In Houston v. Ormes, 252 U. S. 469, 473, it was decided that the section was not an obstacle to the maintenance of a suit against the Secretary of the Treasury and the Treasurer of the United States to establish an equitable lien upon a fund appropriated by Congress to pay a claim found to be due by the Court of Claims, the court saying, "As has been held many times, the object of Congress in this legislation was to protect the Government, not the claimant; and it does not stand in the way of giving effect to an assignment by operation of law after the claim has been allowed." In Seaboard Air Line Railway v. United States, 256 U. S. 655, 657, exceptions to the operation of the section were extended by holding that it did not apply to the transfer of [fol. 28] claims resulting from the consolidation of two railroad corporations. See, also, 22 Opinions of Attorneys General of United States, 637.

While the words of said § 3477 are broad and are construed so as to effectuate the purpose of its framers, it is manifest from the decisions that numerous exceptions exist to their apparently unrestricted sweep, arising from the inherent reasonableness which must be attributed, so far as possible, to every act of the legislative department of government.

The pertinent provisions of the Federal Control Act approved March 21, 1918, c. 25, 40 U. S. Sts. at Large, 451, are § 10, to the

effect that "carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government," and § 12, to the effect that "moneys and other property derived from the operation of the carriers during Federal control are hereby declared to be the property of the United States. Unless otherwise directed by the President, such moneys shall not be covered into the Treasury, but such moneys and property shall remain in the custody of the same officers, and the accounting thereof shall be in the same manner and form as before Federal control. Disbursements therefrom shall, without further appropriation, be made in the same manner as before Federal control."

We are of opinion that these provisions of the Federal Control Act disclose an intent that the business of the railroads and the litigation arising therefrom should go on under Federal administration the same as before except as modified by express provision of the Act and of proclamations pursuant thereto or by necessary implication. The maintenance of an action in his own name by the assignee of a non-[fol. 29] negotiable legal chose in action has been permissible under our laws for more than a quarter of a century. G. L. c. 231, § 5. It is likely that similar statutes have been enacted in other States. The defence here put forward does not seem to depend upon any declared or reasonably necessary policy in the operation of the railroads for the protection of the United States. The formalities established with respect to disbursements of money from the Treasury of the United States are specifically made inapplicable by the statute to the operation of the railroads by the Director General. The receipt of the income and the payment of the expenses of railroad operation under Federal control were to be and remain as before. The provision that actions at law might be brought against carriers under Federal control "as now provided by law" appears to authorize actions by assignees of nonnegotiable legal choses in action, since such actions were authorized at the time of the enactment of the Federal Control Act. The defence here urged depends upon the ground that the carrier was an instrumentality or agency of the Federal government. Such defence is forbidden by the express words of § 10 of the Act. While the question is not free from difficulty, we are of opinion that said § 3477 is not applicable as a bar to the present action.

This conclusion seems to us to be supported by the reasoning of the opinion in Missouri Pacific Railroad v. Ault, 256 U. S. 554, 559. It is in accordance with express decisions in Morgan v. Hines, 65 Mont. 306, 315, Paradise Land & Live Stock Co. v. Davis, 60 Utah, 189, 193-194, and Parrington v. Davis, 285 Fed. 741. See Goodwin Preserv-

ing Company v. Davis 258 S. W. 97 (Ky.). There appears to be nothing contrary to this result in Mechanics' Bank & Trust Co. v. Knoxville, Sevierville & Eastern Railway Co. 148 Tenn. 113.

It follows that the plaintiff's request that the provisions of said § 3477 are not a bar to this action was given rightly by the trial judge.

It is stated in the record that the "court on the agreed facts found pro forma in contract for the plaintiff." The practice of making pro forma rulings or findings has been made frequently and justly [fol. 30] the subject of criticism. Blake v. Pegram, 101 Mass. 592, 597. Parker v. Parker, 118 Mass. 110. Spiers v. Union Drop Forge Co., 180 Mass. 87, 89. United States v. Gleason, 124 U. S. 255. Wm. Cramp & Sons Co. v. International Curtis Marine Turbine Co., 228 U. S. 645. Ex Parte Harley-Davidson Motor Co., 259 U. S. 414. Parties are entitled to the exercise of the judicial faculty by the magistrate before whom a case is presented. Even a positive statement of intention by a party, in the event of an adverse decision, to take a case to another tribunal is no justification for a decision or ruling as a mere matter of form when a decision or ruling is required. A decision resting upon the application of sound learning and judicial experience may be accepted by a defeated party in the calmness of reflection even when a more captious attitude of mind precedes such decision. The purpose manifested by the organization of the several courts of this Commonwealth is that a decision should be made of each case on its merits by each tribunal before which it may come, unless there is express provision of different nature.

The order of the Appellate Division is reversed. Judgment is to be entered for the plaintiff.

So ordered.

J. W. Keith, for the plaintiff.

A. W. Blackman, for the defendant.

[fol. 31] Boston, October 24, 1924.

I certify the annexed to be a true copy of the opinion of the Supreme Judicial Court in the case of Abraham Weiss, administrator, vs. Director General of Railroads, decided on the nineteenth day of September, 1924.

Ethelbert V. Grabill, Reporter of Decisions.

SUPREME COURT OF THE UNITED STATES

ORDER GRANTING PETITION FOR CERTIORARI—Filed January 26, 1925

On Petition for Writ of Certiorari to the Municipal Court of the City of Boston, State of Massachusetts

On consideration of the petition for a writ of certiorari herein to the Municipal Court of the City of Boston, State of Massachusetts, and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

(5911)

Supreme Court of the United States.

October Term, [redacted] 1925

No. [redacted] 223

JAMES C. DAVIS, AGENT,
PETITIONER,

v.

ABRAHAM WEISS, ADMINISTRATOR,
RESPONDENT.

Petition for Writ of Certiorari to the Municipal Court of the City of Boston and Brief in Support Thereof.

ARTHUR W. BLACKMAN,
Counsel for James C. Davis Agent,
Petitioner.

Davis v Slocum 263/115

ADDISON C. MITCHELL & SON, LAW PRINTERS, BOSTON.

INDEX.

TABLE OF CASES CITED.

Supreme Court of the United States.

OCTOBER TERM, 1924.

No.

JAMES C. DAVIS, AGENT, *Petitioner*,

v.

ABRAHAM WEISS, ADMINISTRATOR, *Respondent*.

NOTICE.

To J. W. KEITH, ESQUIRE,
Counsel for Respondent.

Sir: Please take notice that on Monday, the 5th day of January, 1925, upon the opening of the Court, or as soon thereafter as counsel can be heard, the foregoing petition and brief, together with a certified copy of the entire transcript of the record of the case, will be presented and submitted to the Supreme Court of the United States, in its court room in the capitol at Washington, D.C., in pursuance of its rules in such cases made and provided.

Dated this 3d day of December, 1924.

ARTHUR W. BLACKMAN,
Counsel for Petitioner.

Due service of the foregoing notice, together with a copy of the petition for a writ of certiorari and brief in support thereof, is hereby acknowledged.

J. W. KEITH,
Counsel for Respondent.

Boston, Mass., December 4, 1924.

Supreme Court of the United States.

OCTOBER TERM, 1924.

No.

JAMES C. DAVIS, AGENT, *Petitioner*,

v.

ABRAHAM WEISS, ADMINISTRATOR, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE MUNICIPAL COURT OF THE CITY OF BOSTON.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, James C. Davis, Agent under the Transportation Act, respectfully presents to your Honors this his petition for a writ of certiorari addressed to the Municipal Court of the City of Boston, commanding said Court and the clerk thereof to certify to this Court the record and proceedings of the case in said Court wherein your petitioner was defendant and the respondent, Abraham Weiss, Administrator, was plaintiff, together with the opinion therein of the Supreme Judicial Court for the Commonwealth of Massachusetts, for a review and determination of said cause by this Court.

A certified copy of the entire transcript of the record in said cause, in which judgment was made and en-

tered on September 26, 1924, in said Municipal Court of the City of Boston, including the opinion in said cause of the Supreme Judicial Court for the Commonwealth of Massachusetts, is presented and exhibited herewith.

Your petitioner expressly avers, as from said transcript will appear, that in said action at law instituted by the respondent there were especially set up and claimed by your petitioner rights, titles, privileges, and immunities under statutes of the United States, especially under section 3477 of the Revised Statutes of the United States, the provisions of General Orders 50 and 50 A of the United States Railroad Administration, the Transportation Act of 1920, and the Act to Regulate Commerce, and that the final decision and judgment of said Municipal Court of the City of Boston was against the rights, titles, privileges, and immunities so set up and claimed by your petitioner.

Your petitioner further represents that the final decision and judgment of the said Municipal Court of the City of Boston was a decision and judgment of the highest Court of said Commonwealth in which a decision could be had, and that the rights, privileges, and immunities so set up by your petitioner were necessary for a decision of said cause.

In this behalf your petitioner states the following facts:

This action was begun by writ dated May 15, 1919, by one Nominsky, the respondent's intestate, the defendant therein named being The New York, New Haven and Hartford Railroad Company, a Massachusetts corporation, to recover as damages the value of one bale of compressed rags shipped from Brooklyn,

N.Y., on November 21, 1918, by Rose & Company, consigned to the order of Louis Cutler, Beverly, Mass. While the property was on the railroad of The New York, New Haven and Hartford Railroad Company, then being operated by the Director General of Railroads, it was on November 24, 1918, destroyed. The bill-of-lading under which the shipment moved was the uniform bill-of-lading, one of the conditions of which provided that "suits for loss, damage, or delay shall be instituted only within two years and one day after delivery of the property, or, in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed," and it was agreed by the parties that a reasonable time for delivery of the shipment in question was not later than the early part of December, 1918.

On January 27, 1919, the said Louis Cutler, to whom the shipment in question had been consigned, assigned to said Nominsky for a valuable consideration all said Cutler's rights, claims, and the like against the carriers arising out of the loss of the shipment in question.

The said Nominsky, as assignee of the claim of Louis Cutler, prosecuted his action against the corporation The New York, New Haven and Hartford Railroad Company, until, as a result of the decision of the Supreme Judicial Court of Massachusetts in *Nominsky* v. *The New York, New Haven and Hartford Railroad Company*, 239 Mass. 254, it was held that he could not recover against the carrier corporation. Thereafter, on January 14, 1922, the said Nominsky moved to amend his action by substituting for the original defendant, The New York, New Haven and Hartford

Railroad Company, your petitioner, James C. Davis, Agent under the Transportation Act, and this motion was allowed January 25, 1922, whereupon a summons was issued to your petitioner, James C. Davis, requiring him to appear and answer in February, 1922.

Thereafter, on February 13, 1922, your petitioner, said James C. Davis, Agent, duly appeared by counsel, who entered a special appearance for the purpose of contesting jurisdiction, and filed a motion to dismiss said action on various grounds, especially denying the jurisdiction of the Court to entertain the action against the said James C. Davis, alleging that the service against him was null and void because it was in violation of and in conflict with the laws of the United States, because it was not instituted within the time prescribed, nor in the manner provided, by the laws of the United States, and on the further ground that, if the General Laws of the Commonwealth of Massachusetts, under the authority of which your petitioner, said Davis, was summoned as party defendant, authorized the substitution, then the General Laws of said Commonwealth were repugnant to the laws of the United States.

On April 23, 1923, said motion to dismiss was overruled, to which your petitioner duly excepted, and on the same date the respondent herein, Abraham Weiss, on suggestion of the death of the original defendant, was substituted as administrator of the estate of said Nominsky and admitted as party plaintiff to prosecute the action.

Thereafter in due course your petitioner, Davis, defendant in the action below, answered, and, after setting up in his answer his objection to the Court's

jurisdiction for the reasons set forth in the motion to dismiss, further answered and alleged that the title and right of the plaintiff (respondent herein) was derived from an assignment, which, under section 3477 of the Revised Statutes of the United States, was absolutely null and void.

Subsequently, in May, 1923, the action was tried upon an agreed statement of facts, the defendant submitting to the Court certain requests for rulings of law. In substance these requests were that the Court had no jurisdiction over your petitioner, the defendant below; that as against him the action was not begun before January, 1922, when the attempt was made to substitute him for the original corporate defendant; that the action was not brought within the period of two years and one day prescribed by the terms of the bill-of-lading; that the action as originally begun was improperly brought; that under General Order 50 and the Transportation Act the Court had no power to substitute your petitioner as defendant in an action originally brought against a railroad company, and that under the Revised Statutes of the United States, section 3477, the plaintiff could not recover as assignee of the claim against the United States. The requests of your petitioner were denied, to which exceptions were duly saved.

Your petitioner's various exceptions as herein stated were thereafter duly argued in the Appellate Division of the Boston Municipal Court and subsequently on appeal before the Supreme Judicial Court for the Commonwealth. In its opinion filed September 20, 1924, the said Supreme Judicial Court decided adversely to your petitioner his several claims and de-

fenses and duly issued its rescript to the Municipal Court for the City of Boston, in accord with which rescript judgment was entered in the Municipal Court for the City of Boston on September 26, 1924.

The reasons relied on for the issuance of said writ and upon which your petitioner believes the writ ought to be issued are as follows:

I.

The Supreme Judicial Court for Massachusetts, in holding that your petitioner as representative of the Federal Railroad Administration can be made a party by substitution in any case where the action originally was wrongly brought against a railroad corporation, is permitting a course of procedure contrary to the terms of General Orders 50 and 50 A of the United States Railroad Administration, and to the provisions of the Transportation Act.

II.

The Supreme Judicial Court for Massachusetts, in permitting the representative of the Government to be made a party by substitution in an action originally brought against a railroad corporation, was deciding a matter of substance, and not of procedure, and was applying the particular policy of the Commonwealth of Massachusetts in relation to a Federal question. This is contrary to the policy of Congress as expressed in the Transportation Act.

III.

In holding that the representative of the Government can be made a party by substitution in an action orig-

inally brought against the railroad company at a time more than two years after a reasonable time for delivery of the property, the Supreme Judicial Court of Massachusetts holds that such substitution is not the commencement of a new action. This is in conflict with the conditions of the uniform bill-of-lading authorized by the Interstate Commerce Commission and used by the carriers, and is therefore in conflict with the Act to Regulate Commerce, the Transportation Act, and with principles of law enunciated by this Court.

IV.

In holding that the plaintiff's intestate as assignee of one having a claim against the Government arising from the loss of goods while in transit may maintain his action against the Government, the Supreme Judicial Court for Massachusetts denies the claim of your petitioner, the defendant below, founded upon section 3477 of the Revised Statutes of the United States.

V.

The decision of the Supreme Judicial Court for Massachusetts is in the foregoing respects in conflict with other decisions of State Courts and with decisions of the lower Federal Courts, and is believed to be in conflict with principles laid down in recent decisions of this Court. The questions raised herein as to substitution are involved in the case of *Davis* v. *L. L. Cohen & Company*, now number 331, October Term, 1924, before this Honorable Court, both on writ of error and petition for a writ of certiorari.

Your petitioner further represents that the questions presented by this petition and record have not yet

been passed upon by this Court so far as your petitioner is advised, and that such questions are of general public interest and importance.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court directed to the Municipal Court of the City of Boston sitting at Boston, Massachusetts, commanding said Court to certify and to send to this Court, on a day to be therein designated, a full and complete transcript of the record and of the proceedings of the said Municipal Court of the City of Boston had in said cause; to the end that the said cause may be reviewed and determined by this Honorable Court as provided by law, and that the said judgment of the Municipal Court for the City of Boston be reversed by this Honorable Court, and for such further relief as may seem proper. And your petitioner will ever pray.

ARTHUR W. BLACKMAN,
Counsel for Petitioner.

STATE OF MASSACHUSETTS, COUNTY OF SUFFOLK, ss.

Arthur W. Blackman, being first duly sworn, on oath deposes and says that he is the counsel for petitioner, James C. Davis, Agent; that he has read the foregoing annexed petition and knows well the contents thereof; that he has also carefully read and studied a duly certified copy of the transcript of record which accompanies the petition herein, being the transcript of record in the case at bar; that the matters in said petition are, in the judgment of this affiant, duly supported in and by said transcript of record, and that he knows of the above proceedings had, and that the acts in said peti-

tion herein stated are true to the best of his knowledge and belief.

Subscribed and sworn to before me this 4th day of December, 1924.

EDWARD C. BARKER,
[Seal] Notary Public in and for the State of Massachusetts.
My commission expires January 19, 1928.

I do hereby certify that I have carefully examined the foregoing petition for a writ of certiorari, and that the allegations thereof are true, as I verily believe, and in my opinion the petition is well founded and the case is one in which the prayer of the petition should be granted by this Court.

ARTHUR W. BLACKMAN,
Counsel for Petitioner.

Supreme Court of the United States.

OCTOBER TERM, 1924.

No.

JAMES C. DAVIS, AGENT, *Petitioner*,

v.

ABRAHAM WEISS, ADMINISTRATOR, *Respondent*.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

A. Questions Involved.

The petition for writ of certiorari involves three questions:

The first is whether the Agent of the Railroad Administration can be substituted as party defendant in place of the original corporate defendant.

The second is whether the action was barred against the Federal Agent by the bill-of-lading requirement that suit be brought within two years and one day from a reasonable time for delivery of the property, the latter date being in 1918 and the substitution being made in 1922.

The third question is whether under United States Revised Statutes, section 3477, action may be maintained on an assignment of a claim against the United States Railroad Administration.

B. The State Court Erred in Holding that the Substitution can be Made.

General Order 50, October 28, 1918 (U.S. R.R. Ad. Bull. 4), amended by General Order 50 A, January 11, 1919, provided that actions at law, etc., thereafter brought "shall be brought against the Director General of Railroads, and not otherwise." These orders further provided that pleadings in all actions, etc., "now pending" might on application be amended by substituting the Director General of Railroads for the carrier company as party defendant and dismissing the company therefrom.

The orders referred to show that at the time the action here involved was begun, namely, in May, 1919, such action was wrongly brought because it was against a corporate carrier. Such action also was not one in which under these General Orders substitution of the representative of the Railroad Administration might be made, because it was not an action pending at the time said orders were issued.

The Transportation Act, February 28, 1920 (41 Stat. at L. 456, c. 91), section 206 (a) provided that, after termination of Federal control, actions, etc., might be brought against an agent to be designated by the President. This Act also provided in section 206 (d) that actions, etc., "of the character above described pending at the termination of Federal control shall not abate by reason of such termination, but may be prosecuted to final judgment, substituting the agent designated by the President under sub-division (a)."

The substitution allowed by the Massachusetts Courts in the present case was made early in 1922, and it is submitted that no authority therefor is found

in the provisions of the Transportation Act. The Government cannot be sued without its consent, and statutes authorizing the Government to be sued will be most strictly construed. So it has been held that in suits against the Government, by the bringing of a personal action against some officer thereof, substitution of a successor is not permitted except where a statute expressly allows it.

Pullman Co. v. *Croom*, 231 U.S. 571.

And even where by statute such substitution was permitted, it could be allowed only where a suit had been lawfully commenced against the officer.

Smietanka v. *Indiana Steel Co.*, 257 U.S. 1.

That substitution in actions *erroneously* begun, for causes of action arising out of operation of the carriers during Federal control, was not to be permitted is indicated by the provisions of the Act of Congress, March 3, 1923, known as the Winslow Act (42 St. L. 1443, c. 233), amending the Transportation Act by adding paragraphs (h) and (i). With full opportunity to authorize substitution in all cases and with the whole question under consideration, Congress by that Act authorized substitution only in cases "*properly* commenced," and did not, as it might have done, authorize substitution in actions *improperly* commenced.

In *United States, ex rel. Texas Portland Cement Co.*, v. *McCord*, 233 U.S. 157, in which was involved the statute giving creditors of a contractor for the United States the right to sue in the name of the United States upon the contractor's bond and authorizing the intervention of other creditors, this Court said, p. 163:

"These rights to intervene and to file a claim, conferred by the statute, presuppose an action duly brought under its terms. In this case the cause of action had not accrued to the creditors who undertook to bring the suit originally. The intervention could not cure this vice in the original suit. Nor do we think that the intervention could be treated as an original suit."

C. The State Court Erred in Holding that the Action was Not Barred against Your Petitioner by the Provisions of the Bill-of-Lading.

Your petitioner was not made a defendant in this action until more than three years after a reasonable time for delivery of the property in question had elapsed. The bill-of-lading involved expressly required that suit should be begun within two years and one day after a reasonable time for delivery had elapsed. It is submitted that the amendment brought in a new party and was both a departure from law to law and the assertion of a new cause of action.

Union Pacific R. Co. v. *Wyler*, 158 U.S. 285.
United States v. *Dalcour*, 203 U.S. 408, 423.

D. The State Court Erred in Holding that Respondent Herein could Recover Despite the Provisions of Revised Statutes, section 3477.

This section with respect to claims against the Government arising out of Federal control of railroads has been construed in a few cases with different results. In *Paradise Land & Live Stock Co.* v. *Davis*, 60 Utah, 189; 207 Pac. 145; in *Morgan* v. *Hines*, 65 Mont. 306;

211 Pac. 778; and in *Parrington* v. *Davis* (D.C. Ore.), 285 Fed. 741, the provision was held not applicable. On the other hand, in *Mechanics' Bank & Trust Co.* v. *Knoxville, S. & E. Ry. Co.*, 148 Tenn. 113; 251 S.W. 906, it was held after careful consideration of the authorities that an assignment of claim against the Government arising out of the use of the railroad was within section 3477 of the Revised Statutes.

The Supreme Judicial Court of Massachusetts held that section 3477 was not a bar in view of the provisions of section 10 of the Federal Control Act, approved March 21, 1918, chapter 25; 40 United States Statutes at Large, 451, providing that in such actions "no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government."

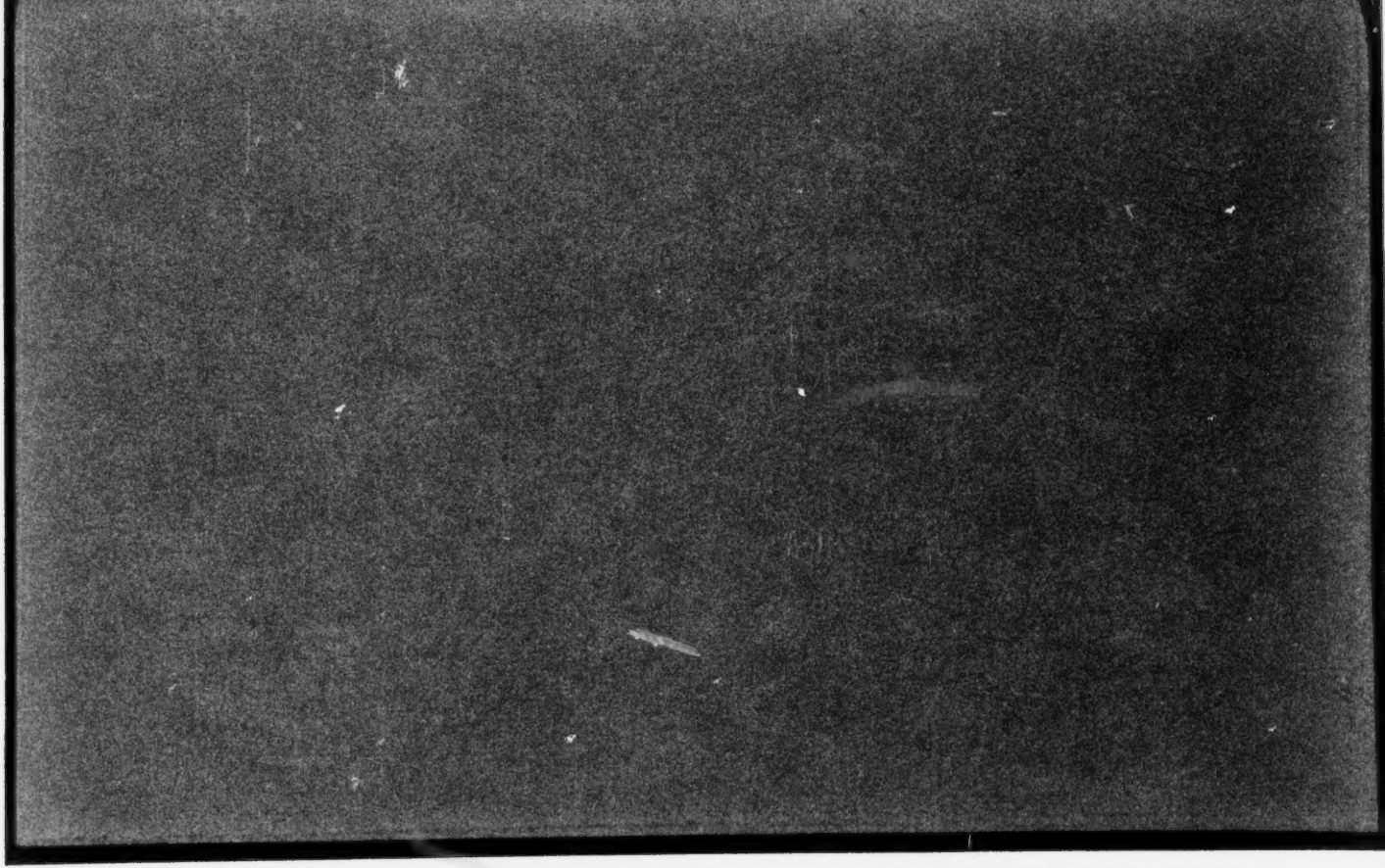
It is submitted, first, that the plea of your petitioner setting up provisions of section 3477 is not the making of a defense upon the ground that the carrier is an agency of the Federal Government. When the cause of action arose, it was one against the Federal Government. No such defense existed nor could one have been relied upon had action been brought by the shipper or by the consignee of the shipment. The respondent's difficulty here is not one of remedies, but a distinct want of title arising from the fact that he stands as grantee of that which at the Government's election could not be granted.

It is submitted in the second place that the question of the applicability of section 3477 is identical with the parallel situation which arose in connection with the Act of Congress of February 8, 1899 (30 Stat. at L. 822, c. 121). That Act related to the substitution of

successors in office of officers of the United States against whom suit had been brought, and barred recovery unless the substitution was made within a year. This Court, in memorandum opinions, dismissed three cases where the substitution had not been made.

Payne v. *Industrial Board*, 258 U.S. 613.
Payne v. *Stevens*, 260 U.S. 705.
U.S. R.R. Administration v. *Slatinka*, 260 U.S. 747.

Respectfully submitted,
ARTHUR W. BLACKMAN,
Counsel for JAMES C. DAVIS, AGENT,
Petitioner.



SUBJECT INDEX.

AUTHORITIES CITED.

Cases:

OPINION IN COURT BELOW.

Supreme Court of the United States.

OCTOBER TERM, 1925.

No. 223.

ANDREW W. MELLON, AGENT, *Petitioner,*

v.

ABRAHAM WEISS, ADMINISTRATOR, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE MUNICIPAL COURT OF THE CITY OF BOSTON, COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR PETITIONER.

Statement of Grounds of Jurisdiction of This Court.

The judgment herein to be reviewed was entered in the Municipal Court of the City of Boston on September 26, 1924 (R. 18), pursuant to a rescript from the Supreme Judicial Court of the Commonwealth of Massachusetts (R. 17). The opinion of the latter Court (R. 20-25) is reported as *Weiss* v. *Director General of Railroads,* 250 Mass. 12. Certiorari was granted by this Court January 26, 1925, 267 U.S. 588.

As the basis of this Court's jurisdiction the petitioner relies upon (1) his motion to dismiss (R. 7), which asserted that the procedure against the defendant (petitioner herein) was in conflict with the laws of the United States, and that the General Laws of Massachusetts authorizing such procedure were repugnant to the laws of the United

States; (2) his answer (R. 8) that under Rev. Sts. sec. 3477, plaintiff below, as assignee of a claim against the United States, could not recover; and (3) his requested instructions for rulings of law (R. 9, 10), which repeated the foregoing grounds of objection, and also asserted that the action was barred by a bill-of-lading provision requiring suit to be begun within two years and one day after a reasonable time for delivery of the property had elapsed. These contentions of your petitioner were denied.

This Court has jurisdiction of this petition under section 237 of the Judicial Code, the statutes involved being the Federal Control Act (Act March 21, 1918; 40 St. at L. 451, c. 25); the Transportation Act (Act Feb. 28, 1920; 41 St. at L. 456, c. 91); and Revised Statutes, sec. 3477.

Statement of the Case.

The action was begun May 15, 1919, in the Municipal Court of the City of Boston, against The New York, New Haven and Hartford Railroad Company, by Nathan Nominsky, as assignee of one Louis Cutler, for the value of a bale of rags shipped in interstate commerce in November, 1918, consigned to Cutler, which bale was destroyed and never delivered to Cutler. In April, 1923, on suggestion of death of the plaintiff Nominsky, the administrator of his estate was admitted as plaintiff to prosecute the action.

The plaintiff below pursued his action against the original defendant, The New York, New Haven and Hartford Railroad Company, until, in *Nominsky* v. *New York, New Haven & Hartford Railroad Company,* 239 Mass. 254, it was decided that action against that defendant could not be maintained, because at the time of the shipment and the loss the complete possession and control of the railroad were vested in the United States.

In January, 1922, the plaintiff below moved to amend his writ and declaration by substituting James C. Davis,

Agent and Director General of Railroads, as defendant in place of the original defendant. That motion was allowed, and process issued summoning Mr. Davis to appear (R. 3, 4).

Thereafter counsel for said Davis filed a special appearance for the purpose of contesting jurisdiction (R. 6), and also a motion to dismiss (R. 6, 7), upon the following grounds:

> "1. That this Court is without jurisdiction to entertain this action against the above named defendant.
>
> "2. That the issuance and service of said writ summoning the above named defendant to appear and answer are null and void because in violation of and in conflict with the laws of the United States.
>
> "3. That this proceeding against the above named defendant was not instituted within the time prescribed by the laws of the United States.
>
> "4. That this action as against the above named defendant was not instituted in the manner provided by the laws of the United States.
>
> "5. That the provisions of the General Laws of said Commonwealth, under authority of which the above named defendant was summoned as party defendant in this action, so far as they purport to authorize the proceedings herein, are repugnant to the laws of the United States, and, therefore, said proceedings are null and void and without authority of law.
>
> "6. That it appears from the record of the return on the writ herein issued to the above named defendant that no service of said writ was made upon the above named defendant in accordance with the provisions of the laws of Massachusetts, and, therefore, such service is null and void."

Said motion to dismiss was denied in April, 1923, to which ruling there was duly filed a request for a report,

the appropriate proceeding under the state practice (R. 7).

Thereafter said Davis, not waiving his motion to dismiss and not admitting the jurisdiction of the Court over him, filed an answer to the merits (R. 7, 8), which set up as one ground of defense, among others, the following:

> "And further answering the defendant says that the plaintiff's intestate was as appears by the declaration in this action, assignee of an alleged claim of one Louis Cutler; that the plaintiff's alleged title and right against this defendant, if any there be, is derived from said alleged assignment; that the plaintiff's said claim is a claim upon the United States; that under section 3477 of the Revised Statutes of the United States said assignment is absolutely null and void."

Subsequently the action was tried upon a statement of agreed facts (R. 8, 9), which showed that the plaintiff Weiss was the administrator of the estate of Nominsky, who was the assignee of a claim which one Cutler had against The New York, New Haven and Hartford Railroad Company, or others, for the value of the lost goods. It also appeared from the facts agreed to that the shipment was destroyed while in possession of the Railroad Administration, operating The New York, New Haven and Hartford Railroad; that a reasonable time for the delivery of said shipment was not later than December, 1918; that the shipment moved on an order or negotiable bill-of-lading, by which the goods were consigned to the order of Cutler, the holder thereof; and that one of the conditions of the bill-of-lading provided that—

> "Suits for loss, damage, or delay shall be instituted only within two years and one day after delivery of the property, or, in case of failure to make delivery, then within two years and one day after a reasonable time for delivery had elapsed."

At the trial of the action the defendant Davis duly submitted requests for rulings of law (R. 9, 10), as follows:

"1. That this court is without jurisdiction to entertain this action against the above named defendant.

"2. That the action against this defendant was not begun prior to the issuance of a summons directed to this defendant dated January 25, 1922.

"3. That under the defendant's tariffs and schedules of rates one of the terms and conditions of the contract between the parties was that in case of loss or damage to the property any action brought to recover must be brought within two years and one day after a reasonable time for delivery of the property had elapsed.

"4. That the action against this defendant was not in fact brought nor begun until long after two years and one day had elapsed after a reasonable time for delivery of the property.

"5. That the plaintiff's action as against this defendant was not begun within the time required by the terms and conditions of the contract between the parties, and said action is, therefore, barred.

"6. That under the provisions of General Order 50 and the Transportation Act of 1920, the action as originally begun was improperly brought.

"7. That under the provisions of General Order 50 and the Transportation Act of 1920, the court has no power to substitute in an action brought against the corporation the representative of the United States Railroad Administration as party defendant.

"8. That the claim of one Louis Cutler which was assigned to plaintiff's intestate, was a claim not against the United States Railroad Administration but a claim against the New York, New Haven and Hartford Railroad Company.

"9. That if the said assignment to the plaintiff's intestate be treated as an assignment of Cutler's claim against the United States Railroad Administration, nevertheless, said claim is a claim against the United States, and under Section 3477 of the Revised Statutes of the United States said assignment is null and void and the plaintiff can not recover thereon in this action."

Of these requests, the trial Court denied all except number 6, which was granted. In addition the Court granted the plaintiff Weiss' request number 4, "That the provisions of Section 3477 Rev. Sts. U. S. are not a bar to this action," and found for the plaintiff (R. 10). To these several rulings the defendant Davis duly preserved his rights (R. 11).

On appeal to the Appellate Division of the Municipal Court the finding of the trial Court was reversed on the ground that the plaintiff's fourth request was wrongly allowed (R. 17). The plaintiff Weiss thereupon claimed an appeal to the Supreme Judicial Court of Massachusetts. The latter Court reversed the Appellate Division of the Boston Municipal Court, and directed the trial Court to enter judgment for the plaintiff.

The opinion of the Supreme Judicial Court (R. 20-25) holds (*a*) that the trial Court had the power to permit the amendment in January, 1922, substituting Mr. Davis, Agent, as party defendant; (*b*) that under Massachusetts practice the amendment allowing substitution of the new defendant was proper, despite the bill-of-lading requirement that suit be brought within two years and a day after a reasonable time for delivery had elapsed; and (*c*) that section 3477 of the United States Revised Statutes, relating to assignments of claims against the Federal Government, was not applicable in view of the provisions of section 10 of the Federal Control Act.

Specification of Errors Relied On.

It is respectfully urged that this judgment of the Municipal Court of the City of Boston should be reversed, for the following reasons:

1. The Supreme Judicial Court of Massachusetts, in holding that your petitioner as representative of the Federal Railroad Administration can be made a party by substitution in any case where the action originally was wrongly brought against a railroad corporation, is permitting a course of procedure contrary to the terms of General Orders 50 and 50 A of the United States Railroad Administration, and to the provisions of the Transportation Act.

2. The Supreme Judicial Court of Massachusetts, in permitting the representative of the Government to be made a party by substitution in an action originally brought against a railroad corporation, was deciding a matter of substance, and not of procedure, and was applying the particular policy of the Commonwealth of Massachusetts in relation to a Federal question. This is contrary to the policy of Congress as expressed in the Transportation Act.

3. In holding that the representative of the Government can be made a party by substitution in an action originally brought against the railroad company at a time more than two years after a reasonable time for delivery of the property, the Supreme Judicial Court of Massachusetts holds that such substitution is not the commencement of a new action. This is in conflict with the conditions of the uniform bill-of-lading authorized by the Interstate Commerce Commission and used by the carriers, and is therefore in conflict with the Act to Regulate Commerce, the Transportation Act, and with principles of law enunciated by this Court.

4. In holding that the plaintiff's intestate, as assignee of one having a claim against the Government arising from

the loss of goods while in transit, may maintain his action against the Government, the Supreme Judicial Court of Massachusetts denies the claim of your petitioner, the defendant below, founded upon section 3477 of the Revised Statutes of the United States.

Argument.

I. This Court may Decide on Certiorari the Matter of Substitution.

At the outset it may be suggested that the question of substitution should have been raised, not by certiorari, but by writ of error, which was held to be proper in *Davis, Agent,* v. *L. L. Cohen & Co.*, 268 U.S. 638. While counsel believes that this issue may properly be heard on certiorari, because the opinion of the Supreme Judicial Court of Massachusetts involves an interpretation of both the Federal Control Act and the Transportation Act, nevertheless the case is properly here on certiorari so far as it respects the application of Rev. Sts. sec. 3477. And when a case is properly before this Court on a Federal question, all questions presented by the record may be considered.

Atlantic Coast Line R. Co. v. *Daughton*, 262 U.S. 413, 416.
Davis v. *Wallace*, 257 U.S. 478, 482.
McGowan v. *Parish*, 237 U.S. 285, 292.
Siler v. *Louisville & N. R. Co.*, 213 U.S. 175, 191.
Horner v. *United States*, 143 U.S. 570, 576-577.

In *Greene* v. *Louisville & Interurban R.R. Co.*, 244 U.S. 499, 508, this Court said:

> "The contention of plaintiffs, . . . presents, without question, a real and substantial controversy under the Constitution of the United States, which . . . con-

ferred jurisdiction upon the federal court, irrespective of the citizenship of the parties. This being so, the jurisdiction of that court extended, and ours on appeal extends, to the determination of all questions involved in the case, including questions of state law, irrespective of the dispostion that may be made of the federal question, or whether it be found necessary to decide it at all."

In *Atlantic Coast Line R. Co.* v. *Daughton, supra,* this Court said:

"Since the cases are properly here on federal questions, all questions presented by the record whether involving federal law or state law must be considered."

II. The State Court had No Power at All to Make a Substitution where the Action was Begun Erroneously.

This Court has lately held, in *Davis, Agent,* v. *L. L. Cohen & Co.,* 268 U.S. 638, that the original suit against the Railroad Company was not a suit against the Director General, that the service of the original writ upon the Railroad Company did not bring the Director General before the Court, and that the amendment, substituting the designated Agent as the defendant, was, in effect, the commencement of a new and independent proceeding to enforce the liability of the Government.

At the termination of Federal Control there was no suit pending against the Director General in the case at bar. After the termination of Federal Control the only consent the Government had given to being sued was contained in section 206 of the Transportation Act. And the only authority for substitution was section 206 (*d*) of the Transportation Act, as follows:

"(d) Actions, suits, proceedings, and reparation

> claims, *of the character above described pending* at the termination of Federal control shall not abate by reason of such termination, but may be prosecuted to final judgment, substituting the agent designated by the President under subdivision (a).'"*

Relative to substitution under this section this Court said in the *Cohen case, supra*, where substitution was attempted after Federal Control had ceased:

> "Nor was this amendment authorized under section 206 (d), which related solely to the substitution of the designated Agent as the defendant in a suit which had been previously brought against the Director General to enforce the liability of the Government, that is, merely authorized the substitution, in such a suit, of another Federal Agent for the one already before the court. *It had no application to suits pending against a railroad company alone in which there was no Federal Agent for whom the designated Agent could be substituted, where the substitution of the designated Agent for the railroad company would work an entire change in the cause of action.*"

III. If it be Assumed for the Sake of Argument that the State Court had a General Power of Substitution, Nevertheless such Substitution had to be Made before Any Period of Limitation had Expired.

In the case at bar the shipment was made in November, 1918. The agreed facts contained a statement that a reasonable time for delivery was not later than the early part of December, 1918 (R. 9). The Supreme Judicial Court of Massachusetts so ruled (R. 20). The bill-of-lading contained a provision that "suits for loss, damage, or delay shall be instituted only within two years and one day after

* Italics in this brief are those of the writer.

delivery of the property, or, in case of failure to make delivery, then within two years and one day after a reasonable time for delivery had elapsed" (R. 9, 14). The substitution of Mr. Davis herein for the original defendant, the Railroad Company, was made in January, 1922, or more than three years after the time when delivery reasonably should have been made.

If, therefore, the amendment substituting the designated Agent as the defendant was, in effect, the commencement of a new and independent proceeding to enforce the liability of the Government, as was held in the *Cohen case, supra,* then it came too late, as the right to sue had already been barred under the terms of the bill-of-lading.

Ellis v. *Davis, Agent,* 260 U.S. 682.

IV. The State Court Erred in Holding that the Respondent Herein could Recover Despite the Provisions of Revised Statutes, Section 3477.

The shipment in question was consigned to the order of one Cutler, the owner. Cutler assigned his claim, arising from the loss of the goods while in transit, to one Nominsky, who began the present action, now prosecuted by his administrator. Your petitioner contends that the action cannot be prosecuted against the United States where the claim was acquired by assignment.

U.S. Rev. Sts. sec. 3477, is in these words:

> "All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the pres-

ence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same."

We are not concerned here as to the validity of the assignment between the parties (as to which see *Jernegan* v. *Osborn,* 155 Mass. 207, and *Thayer* v. *Pressey,* 175 Mass. 225), nor with any transfer of title by operation of law (as to which see *Seaboard Air Line Ry.* v. *United States,* 256 U.S. 655), but with the right of the original plaintiff, Nominsky, to recover in a direct suit against the Government.

In view of the decision of this Court in *Nutt* v. *Knut,* 200 U.S. 12, no doubt exists that the respondent's intestate was barred from recovery by section 3477, unless the provisions of the Federal Control Act (Act of March 21, 1918; 40 St. at L. 451, c. 25) give relief.

The Control Act, sec. 10, provided in part:

"That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered

as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. . . ."

The Supreme Judicial Court of Massachusetts, while admitting that the question was not free from difficulty, held that the defense here urged did not seem to depend upon any declared or reasonably necessary policy in the operation of the railroads for the protection of the United States, and further that it did depend upon the ground that the carrier was an instrumentality or agency of the Federal Government.

1. The Provisions of Section 10 of the Control Act do Not Apply to This Suit, because, as against the Government, it was Begun after the Passage of the Transportation Act, which is Controlling.

The Control Act was passed in 1918, at a time when the railroads were actually being operated by the Government. Its purpose was to regulate such operation and control. Its title in part was "To provide for the operation of transportation systems *while under Federal control.*"

Section 10 of the act contained the provisions authorizing suits. Necessarily causes of action would arise, and the Government desired to make it clear that, even though the sovereign was operating the roads, nevertheless its usual immunity to suit was not to be a bar. Section 10 specifically related to the period of operation. The language is "carriers *while under Federal control.*" Clearly there is no intent to legislate as to the situation which would obtain *after* the end of Federal control.

When the time came for the return of the roads and for providing for suits *thereafter*, the situation was covered by

the provisions of the Transportation Act. Section 206 thereof* relates to suits, etc., "*after* the termination of Federal control." The method of procedure is materially different—suits thereafter were not to be subject to any order the President might promulgate; a specific person, an Agent, was designated to be the party defendant; and a limitation was placed upon the time for bringing suit. These and other provisions in this section make it clear that the provisions in the Control Act were not to apply to suits which might be begun thereafter.

The amendment of the writ and declaration in the suit against the Railroad Company, in January, 1922, was in effect the commencement of a new and independent proceeding to enforce the liability of the Government. For at the termination of Federal Control there was no suit pending against the Director General.

Davis v. *Cohen & Co.*, 268 U.S. 638.

Hence the provisions of the Transportation Act, and not those of the Control Act, applied.

2. If it be Assumed for the Sake of Argument that the Provisions of the Control Act are Applicable to Suits Begun after the Passage of the Transportation Act, Nevertheless the Defense that Section 3477 of the Revised Statutes is a Bar may Properly be Made.†

(a) The Government is not to be deemed to have waived any rights or immunities except by clear language.

E. I. DuPont de Nemours & Co. v. *Davis*, 264 U.S. 456, 462.

* Printed herein as Appendix A, as originally passed and as in effect at the time of the substitution of the Federal Agent in January, 1922.

† The only cases which counsel has been able to find wherein section 3477 has been construed in Railroad Administration suits are collected in Appendix B to this brief.

Director General v. *Kastenbaum,* 263 U.S. 25, 27.
Missouri Pac. R. v. *Ault,* 256 U.S. 554, 562, 564.
Davis v. *Corona Coal Co.,* 265 U.S. 219, 222.
United States v. *Whited & Wheless,* 246 U.S. 552.
United States v. *St. Paul, M. & M. R. Co.,* 247 U.S. 310.

In *Davis* v. *O'Hara,* 266 U.S. 314, this Court said:

> "This is an action against the United States. The railroads were taken over and operated by it in its sovereign capacity, and it will not be held to have waived any sovereign right or privilege unless it has plainly done so."

The provisions of the Control Act did not work a repeal of any provisions of Rev. Sts. sec. 3477. There is no language making claims against the Government assignable that were incapable of assignment before its enactment. It certainly contains no words expressly repealing section 3477, either in whole or in part. And there is no necessary implication of intentional repeal. Implied repeals are not favored.

2 Dwarris, Stat. 638, 673.

The rule is that an ancient statute will be impliedly repealed by a later one only when the later is couched in negative terms, or when the matter is so clearly repugnant that it necessarily implies a negative. Where both acts are affirmative and the substance such that both may stand together, both are held to be in force.

Foster's Case, 11 Co. 57.

Now the Control Act does not declare that any claim against the United States shall be assignable. At most it states that the carriers while under Federal Control must not defend on the ground that they are an agency of the Government, or are the sovereign, and hence ordinarily immune to suit. There is therefore no necessary inconsistency between section 3477 and the Control Act. Besides, they relate to different subjects, and it is very doubtful whether a statute relating to one subject can be construed to repeal by implication a prior statute relating entirely to another subject.

United States v. *Gillis*, 95 U.S. 407.

(*b*) *In several instances arising out of Federal Control of railroads, certain sovereign rights, or privileges, or immunities, have been upheld, despite the language of section 10 of the Control Act.*

Despite the language of section 10 of the Control Act, subjecting the carriers—that is, the Government—to all existing laws and liabilities as common carriers, both state and Federal, a statute of Arkansas, providing a penalty for failure promptly to pay an employee his full wages, was held not to apply to the Government, in *Mo. Pac. R. Co.* v. *Ault*, 256 U.S. 554. Referring to provisions of the Control Act, this Court said (p. 563):

> "By these provisions the United States submitted itself to the various laws, state and Federal, which prescribed how the duty of a common carrier by railroad should be performed, and what should be the remedy for failure to perform. By these laws the validity and extent of claims against the United States, arising out of the operation of the railroad, were to be determined. But there is nothing either in the purpose or the letter of these clauses to indicate that Congress intended to authorize suit against the gov-

ernment for a penalty, if it should fail to perform the legal obligations imposed. The government undertook, as carrier, to observe all existing laws; it undertook to compensate any person injured through a departure by its agents or servants from their duty under such law; but it did not undertake to punish itself for any departure by the imposition upon itself of fines and penalties, or to permit any other sovereignty to punish it."

In *Du Pont de Nemours & Co.* v. *Davis,* 264 U.S. 456, the Government brought an action to recover demurrage charges more than three years after the cause of action accrued. The defendant claimed that a provision of the Transportation Act limiting carriers subject to that act to suit within three years after the cause of action accrued was a bar. In holding that such provision was not a bar, this Court said (p. 462):

> "In taking over and operating the railroad systems of the country the United States did so in its sovereign capacity, as a war measure, 'under a right in the nature of eminent domain'; . . . and it may not be held to have waived any sovereign right or privilege unless plainly so provided. Moneys and other property derived from the operation of the carriers during Federal control, as we have seen, are the property of the United States. . . . An action by the Director General to recover upon a liability, arising out of such control is an action on behalf of the United States in its governmental capacity . . . , and, therefore, is subject to no time limitation, in the absence of congressional enactment clearly imposing it. . . . Statutes of limitation, sought to be applied to bar rights of the government, must receive a strict construction in favor of the government. . . ."

Another illustration is the effect of the Act of Congress of February 8, 1899 (30 St. at L. 822, c. 121). That Act provided that no suit against any official of the United States should abate by reason of his death, resignation, etc., but that, at any time within twelve months thereafter, his successor in office might be substituted. This Court, however, on its own motion, in memorandum opinions, dismissed three cases where a Director General or Agent in office had not been substituted within twelve months after the resignation of his predecessor.

> *Payne* v. *Industrial Board,* 258 U.S. 613.
> *Payne* v. *Stevens,* 260 U.S. 705.
> *U.S. R.R. Adm.* v. *Slatinka,* 260 U.S. 747.

In other words, despite the provisions of section 10 of the Control Act, an immunity of the sovereign, that is, the abatement on his death or resignation of an action pending against a public officer, was in fact held by this Court to bar further proceedings.

Again, in *Davis* v. *Corona Coal Co.,* 265 U.S. 219, an action brought in Louisiana by the Director General to recover damages for injury to a railroad wharf, where suit was begun more than three years after the injury, this Court held that the sovereign right to collect its claims, irrespective of any statute, had not been waived. The statute of Louisiana invoked by the defendant barred action after one year. Surely, apart from Government control, the railroad company which owned the wharf would itself have been barred from recovery. This Court said:

> "The provisions of section 10 of the Federal Control Act . . . subjecting carriers 'to all laws and liabilities as common carriers, whether arising under state or Federal laws or at common law, except,' etc., rightly were said by the counsel for the petitioner to do no more than subject operations of the carriers to exist-

ing laws,—not to adopt from the states their several limitations to suits that this Government might bring, while the United States applied no limitations of its own."

(*c*) *The plea of the Federal Agent in the case at bar, invoking the provisions of Revised Statutes, section 3477, is not the making of a defense upon the ground that the carrier is an agency of the Federal Government.*

When the cause of action arose, it was one against the Federal Government. There was a right in the owner of the shipment or the holder of the bill-of-lading to bring action for damages. Had he done so properly and in due season, he could have recovered. There was nothing to prevent such a proceeding. Even though his claim was against the sovereign, no defense could have been made that the sovereign was immune to suit. The plaintiff's difficulty is not one of remedies. His assignor had a remedy. He could have preserved it. The difficulty is that there is now a distinct want of title in the plaintiff, because he stands as grantee of that which, at the Government's election, could not be granted. Obviously the provision in section 10 of the Control Act related to other matters.

V. Conclusion.

It is respectfully submitted that the judgment of the Municipal Court of the City of Boston, entered in accordance with the rescript from the Supreme Judicial Court, should be reversed.

ARTHUR W. BLACKMAN,
Counsel for Andrew W. Mellon, Agent,
Petitioner for Certiorari.

Appendix A.

Section 206 of Transportation Act, 41 St. at L. c. 91, pp. 456, 461.

Sec. 206 (a) Actions at law, suits in equity and proceedings in admiralty, based on causes of action arising out of the possession, use, or operation by the President of the railroad or system of transportation of any carrier (under the provisions of the Federal Control Act, or of the Act of August 29, 1916) of such character as prior to Federal control could have been brought against such carrier, may, after the termination of Federal control, be brought against an agent designated by the President for such purpose, which agent shall be designated by the President within thirty days after the passage of this Act. Such actions, suits, or proceedings may, within the periods of limitation now prescribed by State or Federal statutes but not later than two years from the date of the passage of this Act, be brought in any court which but for Federal control would have had jurisdiction of the cause of action had it arisen against such carrier.

(b) Process may be served upon any agent or officer of the carrier operating such railroad or system of transportation, if such agent or officer is authorized by law to be served with process in proceedings brought against such carrier and if a contract has been made with such carrier by or through the President for the conduct of litigation arising out of operation during Federal control. If no such contract has been made process may be served upon such agents or officers as may be designated by or through the President. The agent designated by the President under subdivision (a) shall cause to be filed, upon the termination of Federal control, in the office of the Clerk of each District Court of the United States, a statement naming all carriers with whom he has contracted for the conduct of litigation arising out of operation during Fed-

eral control, and a like statement designating the agents or officers upon whom process may be served in actions, suits, and proceedings arising in respect to railroads or systems of transportation with the owner of which no such contract has been made; and such statements shall be supplemented from time to time, if additional contracts are made or other agents or officers appointed.

(c) Complaints praying for reparation on account of damage claimed to have been caused by reason of the collection or enforcement by or through the President during the period of Federal control of rates, fares, charges, classifications, regulations, or practices (including those applicable to interstate, foreign, or intrastate traffic) which were unjust, unreasonable, unjustly discriminatory, or unduly or unreasonably prejudicial, or otherwise in violation of the Interstate Commerce Act, may be filed with the Commission, within one year after the termination of Federal control, against the agent designated by the President under subdivision (a), naming in the petition the railroad or system of transportation against which such complaint would have been brought if such railroad or system had not been under Federal control at the time the matter complained of took place. The Commission is hereby given jurisdiction to hear and decide such complaints in the manner provided in the Interstate Commerce Act, and all notices and orders in such proceedings shall be served upon the agent designated by the President under subdivision (a).

(d) Actions, suits, proceedings, and reparation claims, of the character above described pending at the termination of Federal control shall not abate by reason of such termination, but may be prosecuted to final judgment, substituting the agent designated by the President under subdivision (a).

(e) Final judgments, decrees, and awards in actions, suits, proceedings, or reparation claims, of the character

above described, rendered against the agent designated by the President under subdivision (a), shall be promptly paid out of the revolving fund created by section 210.

(f) The period of Federal control shall not be computed as a part of the periods of limitation in actions against carriers or in claims for reparation to the Commission for causes of action arising prior to Federal control.

(g) No execution or process, other than on a judgment recovered by the United States against a carrier, shall be levied upon the property of any carrier where the cause of action on account of which the judgment was obtained grew out of the possession, use, control, or operation of any railroad or system of transportation by the President under Federal control.

APPENDIX B.

Suits Involving Matters Arising out of Federal Control of Railroads wherein Revised Statutes, Section 3477, has been Construed.

1. *Paradise Land & Livestock Co.* v. *Davis*, 60 Utah, 189; 207 Pac. 145. Plaintiff was an assignee of a freight claim. Section 3477 was held not applicable. The Court said:

> "This claim was not against the United States nor was it payable from the treasury of the United States. By Section 12 of the Federal Control Act receipts from the operation of each carrier are the property of the United States, and unless otherwise directed by the President they are to be kept in the custody of the same person and accounted for in the same manner as before Federal control. From this fund disbursements are made without appropriation in the manner provided by the accounting regulations of the Interstate Commerce Commission, and judgments for damages are chargeable to the operation of the railroad and

are payable out of the general receipts. The same Act preserves for claimants and litigants the rights and remedies they had before government control. Among other things—and in any action at law—no defense shall be made thereto on the ground that the carrier is an instrumentality or agency of the Federal Government. The contention is untenable."

2. *Morgan* v. *Hines,* 65 Mont. 306; 211 Pac. 778. At the trial written assignments were received in evidence without objection. On appeal it was contended that they were in conflict with Rev. Sts. sec. 3477. All that was said by the Court was:

> "In view of the provisions of . . . [sections 10 and 12 of the Control Act] and of Sections 206 and 210 of the Federal Transportation Act, 1920, we think the law has no application to assignments of this kind."

3. *Parrington* v. *Davis* (D.C. Ore.), 285 Fed. 741. The sole question discussed was that of the assignment. Plaintiff's counsel argued that Rev. Sts. sec. 3477, did not apply, because of section 10 of the Control Act. The Court said:

> "I am impressed that the question has been disposed of by the holding of the Court in *Missouri Pac. R. Co.* v. *Ault,* 256 U.S. 554, 559, that, the plain purpose of the provision being to preserve to the general public the rights and remedies against carriers, which it enjoyed at the time the railroads were taken over by the President, except in so far as such rights and remedies might interfere with the needs of Federal operation—" [quoting from the *Ault case, supra*].

4. *Mechanics Bank & Trust Co.* v. *Knoxville, Sevierville & Eastern Ry. Co.,* 148 Tenn. 113; 251 S.W. 906. The railroad, having a claim for moneys due to it arising out

of Federal Control, assigned the greater part of it to a creditor, who in turn reassigned it to secure his indebtedness to a bank. The proceeding was a suit to foreclose a railroad mortgage, and the railroad was in the hands of a receiver, who had collected the amount due to the railroad from the United States. The Court held that the assignment was within Rev. Sts. sec. 3477, and was therefore void.

5. *Empire Refining Co.* v. *Davis* (D.C. Okla.), 6 Fed. (2d) 305. The defendant contended that plaintiffs' claim was based upon an assignment of the claim of a corporation in whose favor an award was made by the interstate Commerce Commission, and therefore void under Rev. St. sec. 3477. The plaintiff owned all the shares of stock of the corporation, which became inactive and transferred all its property and assets to the parent company. Relying on *Seaboard Air Line Ry.* v. *United States*, 256 U.S. 655, the Court held that section 3477 did not inhibit assignments resulting from the orderly merger or consolidation of corporations, as this was.

The Court in addition, however, proceeded to discuss the effect of section 10 of the Federal Control Act, and, citing *Morgan* v. *Hines*, *Parrington* v. *Davis*, and *Weiss* v. *Davis*, held that such claims were assignable, both on reason and by the spirit of the Control Act. If we disregard the fact that the consideration of this question, in this respect, is *obiter*, the ruling is adverse to your petitioner's contention herein, as the suit was begun after passage of the Transportation Act, and this fact was expressly brought to the Court's attention.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 223

JAMES C. DAVIS, AGENT, PETITIONER,

vs.

ABRAHAM WEISS, ADMINISTRATOR, RESPONDENT.

RESPONDENT'S BRIEF.

JOHN W. KEITH,
BENJAMIN RABALSKY,
Attorneys for Respondent.

INDEX.

CASES CITED.

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RESPONDENT'S BRIEF.

This case is reported below in 250 Mass. 12.

The questions presented by this petition are three in number.

1st. Was the agent of the railroad administration rightly substituted, as party defendant in the place of the original corporate defendant.

2d. Whether the action was barred against the agent by the requirement of the bill of lading that suit be brought within two years and one day from a reasonable time for delivery of the property, the latter date being in 1918, and substitution being made in January 23d, 1922.

3d. Whether under the United States Revised Statutes, section 3477, the action may be maintained on an assignment of a claim against the United States Railroad Administration.

These are the questions as presented by the petition for certiorari granted January 26, 1925.

The rights of the respondent, the plaintiff below, are to be found in the Act of August 29, 1916, 39 Stats. at L. 645, and the proclamation thereunder, December 26, 1917; Federal Control Act, March 21st, 1918, 40 Stats. at L. 451, General Order 50; Transportation Act 1920, 41 Stats. at L. 1789, and Act of March 3d, 1923, 42 Stats. at L. 1443. The Act of August 29, 1916, gave the President power to take possession and control of any system of transportation for war purposes. The proclamation thereunder provided that suit may be brought by and against said carrier and judgment ordered as heretofore, until and except so far as said Director may by general or special order otherwise determine.

The right to sue is contained in the proclamation of December 26, 1917, and in section 10 of the Federal Control Act, as follows:

> Sec. 10. Carriers while under Federal control shall be subject to all laws and liabilities as common carriers whether arising under State or Federal laws, or Common Law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to the Federal control, or with any order of the President. Actions at law, or suits in equity may be brought by and against such carriers and judgment rendered as now provided by law."

Wherever by either the common law or statute law of a State a right of action has become fixed and a legal liability

incurred that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties.

Miller, J., in Dennick *vs.* R. R. Co., 103 U. S., 11.
Bigby *vs.* U. S., 188 U. S., 400.
Davis *vs.* Sloane, 263 U. S., 158.

Prior to the decision of this court in Mo. Pac. R. R. Co. *vs.* Ault, 256 U. S., 554, the Federal Control Act has been before the courts in at least twenty-eight cases.

Of the twenty-eight cases, Mardis *vs.* Hines, 258 Fed. 945, Dahn *vs.* McAdoo, 256 Fed. 549, Haubert *vs.* B. & O. R. R. Co., 259 Fed. 351, Nash *vs.* So. Pac. Co., 260 Fed. 208, and Westbrook *vs.* Director General, 263 Fed. 211, were the only authorities that at that time had decided that suits should not be brought against the carrier, but should be brought against the Director General; all the others had decided that the suit was properly brought against the carrier.

As was said by Rugg, Chief Justice, "This action was brought against the railroad, according to a widely prevailing though erroneous view of the profession as to the proper defendant under the Federal control."

The weight of authority at that time sustained the act of counsel in commencing suit against the carrier, New York, New Haven & Hartford Railroad Co.

Rights were also given by General Order Number 50, and in that order it is provided:

> "The pleadings in all such actions at law, suits in equity, or proceedings in admiralty, now pending against any carrier, on a cause of action arising since

> December 31, 1917, based upon a cause of action, arising from, or out of the operation of the railroad, or other carrier, may on application be amended by substituting the director general of the railroad for the carrier company as party defendant, and dismissing the company therefrom."

General Order 50A, does not change in any way what is quoted above from general order number 50.

Rights of the respondent herein, plaintiff below, are further given by the Transportation Act of 1920, that act in Section 206A provides:

> "Actions at law, suits in equity, proceedings in admiralty, based on causes of action arising out of the possession, use, or operation by the president of the railroad or system of transportation of any carrier (under the provisions of the Federal Control Act or of the Act of August 29, 1916) of such a character as prior to Federal control could have been brought against such carrier, may after determination of Federal control be brought against an agent designated by the President for such purpose, such actions, suits or proceedings may * * * be brought in any court which but for Federal control would have had jurisdiction of the cause of action had it arisen against such carrier."
>
> "206. (D). Actions, suits, proceedings, and reparation claims of the character above described pending at determination of Federal control shall not abate by such determination but may be prosecuted to final judgment, substituting the agent designated by the President under subdivision A."

By an act approved March 3d, 1923, 42 Stat. at L. 1443, chapter 233, Congress amended the transportation act by adding two new subdivisions:

"(II). Actions, suits, proceedings, and reparation claims of the character described in subdivision (A) (C) (D) properly commenced within the period of limitation described and pending at the time this subdivision takes effect shall not abate by reason of the death, resignation, or removal from office, of director general of railroads, or the agent designated under subdivision (A), but may (despite the provision of the act entitled 'An act to prevent the abatement of present actions, approved February 8, 1899') be prosecuted to final judgment, decree or award substituting at any time before satisfaction of such final judgment, decree or award the agent designated by the President then in office."

"(I). Orders providing for a substitution in such cases, made before this subdivision takes effect by courts having jurisdiction of the parties and subject-matter are hereby validated anything in such act of February 8, 1899, to the contrary notwithstanding."

It is submitted that the plain purpose of the foregoing acts of Congress is to preserve all rights of persons injured by the negligence of the carrier while under the control of the Director General, suit being brought against the Director General.

When the report of the committee to whom had been referred the bill—H. R. 14308—was made to the house a letter from James C. Davis, Director General, the petitioner herein, was annexed to the report in which Mr. Davis used the following language:

"My Dear Mr. Winslow:

"I have carefully examined the provisions of H. R. 14308, an act amending section 206 of the Transportation Act of 1920.

"The proposed legislation has the entire approval of the railroad administration. In liquidating the claims growing out of Federal control, necessarily much litigation, arising out of disputed liability in the matter of personal injuries, loss and damage, fire, etc., has arisen.

"These provisions seem to be just, and in any cases to which they apply the Government has had, or will have the privilege of defending on the merits.

"I therefore see no reason why the proposed legislation should not be enacted.

"Yours truly,

"JAMES C. DAVIS,
"Director General."

That an act passed after the event, which in effect ratifies what has been done, is valid so far as Congress could have conferred such authority before admits of no reasonable doubt.

Miller, J., in Mitchell *vs.* Clark, 110 U. S. 633.
Davis *vs.* Lewis, 288 Fed. 704.

Where a State descends from the plane of sovereignty and contracts with private persons it is regarded *pro hac vice* as a private person itself, and is bound accordingly.

Swayne, J., in Hall *vs.* Wisconsin, 103 U. S. 5.

This last act of March 3, 1923, validated the substitution made January 23, 1922, and that substitution was within the two years allowed by the Transportation Act, the two years named therein not expiring until February 28, 1922.

Where a person has acquired a claim against the Government of an equitable, moral, or honorable nature, the Na-

tion, speaking broadly, owes a debt to an individual when his claim grows out of right and justice—the power of Congress extends to the payment of such debts.

U. S. *vs.* Realty Co., 163 U. S. 427.

U. S. *vs.* Cook, 257 U. S. 523.

The Federal Control Act gives a new right, but does not describe or prescribe any exclusive remedy; in such case the common law will furnish an adequate remedy.

The jurisdiction of the State court to try and determine this cause of action cannot be doubted.

Clafflin *vs.* Houseman, 93 U. S. 130.

Robb *vs.* Connelly, 111 U. S. 624.

Mondou *vs.* N. Y., N. H. & H. R. R. Co., 223 U. S. 1.

Galveston H. S. A. R. Co. *vs.* Wallace, 223 U. S. 481.

The rule laid down by this court in the case last cited is as follows:

"LAMAR, *J.*:

> "Where the statute creating the right provides an exclusive remedy to be enforced in a particular way, or before a special tribunal, the aggrieved party will be left to the remedy given by the statutes which created the right. But jurisdiction is not defeated by implication. And considering the relation between the Federal and State governments, there is no presumption that Congress intended to prevent the State courts from exercising the general jurisdiction already possessed by them, and under which they already had the power to hear and decide causes of

> action created by Federal statutes. On the contrary, the absence of such provisions would be construed as recognizing that where the cause of action was not penal, but civil and transitory, it was to be subject to the principles governing that class of cases, and might be asserted in a State court as well as in those of the United States. This presumption would be strengthened as to a statute like this passed not only for the purpose of giving a right, but of affording a convenient remedy."

In Penn. R. Co. *vs.* Puritan Coal Co., 237 U. S. 121, a case under the Commerce Act, 24 Stats. at L., 380, chapter 104, Lamar, J., says:

> "The act was both declaratory and creative. It gave shippers new rights while at the same time reserving existing causes of action."

So, under the Federal Control Act, that act gave new right, but left the whole question here involved to be tried in any court that obtained jurisdiction of the parties. In the present case there is only a claim of damages occasioned by the negligence of the carrier. State and Federal courts have concurrent jurisdiction of such a claim.

The Federal Control Act expressed the consent of the sovereign power to see full justice done under the circumstances of this case.

U. S. *vs.* Thompson, 257 U. S. 419.

The Federal right is enforceable in a State court wherever the ordinary jurisdiction as prescribed by local law is appropriate to the occasion and is invoked in conformity with those laws. The grant of concurrent jurisdiction implies

that in the first instance the plaintiff shall have the choice of the court. As an incident he is entitled to whatever the remedial advantage inheres in the particular forum.

State *ex rel.* St. B. & M. Ry. Co. *vs.* Taylor, 266 U. S. 201.

Furthermore, the Congress contemplated suits in State courts and accepted State procedure in advance. We see no reason why it should be supposed to have excluded ordinary incident of states procedure.

Holmes, J., Dickinson *vs.* Styles, 246 U. S. 631.

With what functions the State courts may be invested is a matter of State law and not of Federal concern. It is also a matter of construction in which the decision of the State court will be followed by a Federal court.

Freeport Water Co. *vs.* Freeport, 180 U. S. 587.

It is submitted that the rule of court procedure and rules of practice in the State court of Massachusetts governed the court therein when passing upon the question of amendment and substitution.

State Procedure.

The law of Massachusetts in relation to amendments is now contained in the General Laws, chapter 231, section 51, as follows:

> "The court may at any time before final judgment, except as otherwise provided, allow amendments introducing a necessary party, discontinuing as to a party, or changing the form of the action and may allow any other amendment in matter of form, or substance, in any process, pleading or procedure.

which may enable the plaintiff to sustain the action for the cause for which it was intended to be brought, or enabling the defendant to make a legal defense."

This has been the law in Massachusetts since 1852, a period of more than seventy years. The substitution permitted by the State court was justified by the statute of Massachusetts.

McLaughlin *vs.* West End St. R. R. Co., 186 Mass. 150.

Ætna Mills *vs.* Director General, 242 Mass. 255.

Gonga *vs.* Director General, 243 Mass. 101.

Practice in the courts is based on local statutes and we (Supreme Court of the United States) are not disposed to revise the decision of the Supreme Court in such cases.

Armeyo *vs.* Armeyo, 181 U. S. 558.

English *vs.* Arizona, 214 U. S. 359.

County Commissioners *vs.* New Mexico, 215 U. S. 296.

The elementary rule is that amendments are within the discretion of the trial court and are not susceptible of review or error except for a clear abuse.

Royal Ins. Co. *vs.* Miller, 199 U. S. 353.

Gormley *vs.* Bunyan, 138 U. S. 623.

Kinney *vs.* Columbia S. & L. Association, 191 U. S. 78.

The determination of matters of pleading ordinarily rests with the State tribunal even if the rights there in force are created by Federal law.

Brandeis, J., in Lee *vs.* Cent. of Ga. Ry. Co., 252 U. S. 109.

An amendment after the statute of limitation has run which leaves the cause of action unchanged is rightfully allowed.

Fidelity Tr. Co. *vs.* Dubois Electric Co., 253 U. S. 212.

There can, of course, be no doubt of the general principle that matters respecting the remedy—such as the form of the action, sufficiency of the pleading, rules of evidence, and the statute of limitations—depend on the law of the place where the suit is brought.

Ct. Vt. R. Co. *vs.* White, 238 U. S. 507.

The decision of a State court as to what constitutes the commencement of a suit in that court is not reviewable in the Supreme Court.

Miller, J., in Richmond M. Co. *vs.* Rose, 114 U. S. 576.

Renaud *vs.* Abbot, 116 U. S. 277.

Matters of local practice do not concern us and are not open for review in the Federal Supreme Court.

Washington *vs.* Miller, 235 U. S. 422.

Holmes, J., in Ferryman *vs.* Woodard, 238 U. S. 148.

Price *vs.* Illinois, 238 U. S. 446, page 451.

A party to an action has no vested right to have a case decided and determined upon a form of procedure which may have been inadvisedly or mistakenly chosen. The evidence may show a substantial variance between the allegations and

the proof and at the same time disclose a legal right which the court in its discretion may make available and valuable by the allowance of an amendment in matter of form or substance.

Stevenson, Admr., *vs.* Nichols, 157 U. S. 370.
Brainerd *vs.* Buck, 184 U. S. 99.
Pizer *vs.* Hunt, 250 Mass. 498.

The decision of a State court upon questions of State law is not subject to review by the Federal Supreme Court.

The Winnebago, 205 U. S. 354.

Limitations.

A statutory limitation for the commencement of an action does not prevent the petition or complaint from being amended after the expiration thereof where no independent cause of action is introduced.

Blanchard *vs.* L. S. & M. S. R. Co., 126 Ill. 416.
Texas and P. R. R. Co. *vs.* Cox, 145 U. S. 593.
A. & P. R. Co. *vs.* Laird, 164 U. S. 393.
Missouri, K. & T. R. Co. *vs.* Wolf, 226 U. S. 570.

In the case last cited Pitney, J., says:

> "The argument for reversal rests wholly upon the mode of procedure followed in the circuit court. In Amr. Co. *vs.* Birch, 224 U. S. 547, there was no effort to amend by joining or substituting the personal representative and this court by reversing the judgment did so without prejudice to such rights as the personal representatives might have. Nor do we think that it was equivalent to the commencement of a new cause of action, so as to render it subject to the two years' limitation prescribed by section six of the Employers' Liability Act. The change was in form

rather than in substance. It introduced no new or different cause of action nor did it set up any different state of facts as a cause of action and therefore it related back to the beginning of the suit."

The general rule is that an amendment relates back to the time of the filing of the original petition, so that the running of the statute of limitations against the amendment is arrested thereby, but this rule applies only to an amendment which does not create a new cause of action.

White, J., in U. P. R. Co. *vs.* Weiler, 158 U. S. 851.
A. & P. R. Co *vs.* Laird, 164 U. S. 393.
Underwood Cont. Co. *vs.* Davies, 287 Fed. 776.

The cause of action was the loss and non-delivery of the goods named in the bill of lading, and the plaintiff below intended to bring his action against the person liable for the injury. The cause of action was the same throughout the entire litigation.

Cormier *vs.* Brock, 212 Mass. 292.

The amendment of January 23, 1922, did not introduce a new cause of action.

Dahn *vs.* Davis, 258 U. S. 421.

The amendment merely expanded or amplified what was already alleged in support of the cause of action, already asserted, and was not affected by the lapse of time. The facts constituting the tort were the same whichever law gave them effect.

N. Y. C. & H. R. R. Co. *vs.* Kinniy, 260 U. S. 340.
Brainerd *vs.* Buck, 184 U. S. 99.

The introduction of the new defendant was an elongation of the original action and not the institution of a new suit.

Kearney *vs.* Dunn, 15 Wall. 51.

The authority of a court to make new parties to a suit especially after judgment or decree rests in its sound discretion, which, except for abuse, can not be reviewed on appeal or a writ of error.

Clark, J., U. S. ex rel. La. *vs.* Jack, 244 U. S. 397.

Congress can by subsequent legislative enactment and ratification make that action legal that was originally defective for want of legal sanction whenever it could have authorized the action in the first instance.

Bowles *vs.* Brimfield, 120 U. S. 759.

Roberts *vs.* No. Pac. R. R. Co., 158 U. S. 1.

That is what Congress did in enacting the Winslow Act.

This court rarely disturbs local decision on questions of local practice.

Holmes, J., in Sanford *vs.* Ainsa, 228 U. S. 705.

A.

Subdivision (F) of Section 206 of the Transportation Act provides:

> "The period of Federal control shall not be computed as a part of the periods of limitations in action against carriers or in claim for reparation to the commission for causes of action arising prior to Federal control."

This court has construed subdivision F to mean that subdivision F does not apply where the cause of action has been barred before the Transportation Act took effect.

The cause of action in the case at bar arose early in December, 1918, and the writ was sued out May 15, 1919.

The substitution was made January 25, 1922, and the appearance of the petitioner as defendant herein was on February 13, 1922. *The limitation named in the bill of lading, to wit, two years and a day, did not expire until December 1, 1920.*

Records, pages four, six, eight, and nine.

Under Section 206 of the Transportation Act, which took effect March 1, 1920, a period of two years was allowed for the purpose of commencing suit against the agent named by the President.

At the time of the taking effect of the Transportation Act, the claim here in suit *had not and could not have been barred,* for nine months more had to run before the limitation named in the bill of lading could have expired. Under the construction of subdivision F by this court, *this cause of action was not barred when the substitution was made.* The facts in this case are in exact converse to the rule laid down by this court in

Fullerton-Kruger L. Co. *vs.* No. Pac. R. Co., 263 U. S. 435.

Danzer & Co. *vs.* Gulf and S. I. R. Co., Adv. Ops. Sup. Ct., 69 L. Ed. 720.

Under the provisions of Section 206 of the Transportation Act and of the Winslow Act a substitution in this case was rightly made.

Davis *vs.* Lewis, 288 Fed. 704.

Davis *vs.* Preston, 264 S. W. 331.

Kilgore *vs.* Hines, 265 S. W. 744.

Service of Process.

Due and sufficient service of the summons upon Davis, agent, the petitioner herein, was made.

Report, page four.

Transportation Act, Section 206 (B).

Vicksburg, S. & P. R. Co. *vs.* Anderson Tulley Co., 256 U. S. 408.

In the case at bar the appearance for the petitioner herein was in these words:

> "The clerk will please enter my special appearance for the defendant Davis for the purpose of contesting jurisdiction.
>
> "A. W. BLACKMAN,
> "*Atty., Appearing Specially.*"

Record, p. 6.

The legal effect of such a pleading was clearly stated in Phillips *et al. vs.* Davis, 147 N. E. 96.

"RUGG, C. J.:

> "The motion to dismiss for want of jurisdiction was rightly disallowed in the district court. The special appearance had no other effect than to enable Mr. Hines to raise the question here argued. That being rightfully overruled, his participation in the trial on the merits in the district court, protected his every right."

B.

The Municipal Court of the City of Boston would have had jurisdiction of the Director General of Railroads if he had been properly made a party. It also had jurisdiction

over the cause of action whether the alleged wrong was committed by the railroad or by the Director General of Rail roads.

Lonegan *vs.* American Ex. Co., 250 Mass. 30.

The respondent respectfully submits that the substitution in the case at bar by the Municiapl Court of the City of Boston was rightly made.

The Claim that the Assignment is Null and Void.

This claim is based on Section 3477, Revised Statutes of United States. That section is as follows:

> "All transfers and asignments made of any claim upon the United States, or any part or share thereof, or interest therein, whether absolute or conditional and whatever may be the consideration therefor, and all powers of attorney, orders or other authorities for receiving payments of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due and the issuing of a warrant for the payment thereof. Such transfer, assignment, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them before an officer having authority to take acknowledgment of deed and shall be certified by the officer, and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney, to the person acknowledging the same."

This statute was first enacted in 1853 and the title of the act is "To prevent fraud on the Treasury."

10 Stats. at L. 170.

This statute is not to be interpreted according to the literal acceptance of the words used.

U. S. *vs.* Gillis, 95 U. S. 407.
Erwin *vs.* U. S., 97 U. S. 392.
Goodman *vs.* Niblack, 102 U. S. 556.
Bailey *vs.* U. S., 109 U. S. 432.

This statute applies only to such claims as require allowance by some accounting officer, an ascertainment of the amount due thereon and the issue of a warrant for their payment.

22 Op. Atty. Gen'l. 637.

This section refers only to claims against the United States which can be presented by the claimant to some department or officer of the United States for payment or may be prosecuted in the court of claims.

This section was intended solely for the protection of the Government and its officers during the adjustment of claims.

Hobbs *vs.* McLean, 117 U. S. 567.
Ball *vs.* Hallsell, 161 U. S. 72.
McGowan *vs.* Parish, 237 U. S. 285.
Houston *vs.* Ormel, 252 U. S. 469.
Western Pac. R. Co. *vs.* U. S., Adv. Op. Sup. Ct., 69 L. Ed. 569.

The Revised Statutes of the United States, 3477, is in direct conflict with Section twelve of the Federal Control Act.

Section twelve provides as follows:

"Money and other property derived from the operation of the carriers during the Federal control, are hereby declared the property of the United States. Unless otherwise directed by the President, such moneys shall not be covered into the treasury, but such moneys and property shall remain in the custody of the same officers, and the accounting thereof shall be in the same manner and form as before Federal control. Disbursement therefrom shall without further appropriation be made in the same manner as before Federal control."

A claim for damages sustained for loss of property is a claim not for a penalty, but for compensation; it is a property right, assignable in its nature, and must be regarded as assignable at law in the absence of any expression of a legislative intent to the contrary.

Spiller *vs.* A., D. & S. S. R. Co., 253 U. S. 117.
Sandoval *vs.* Davis, 288 Fed. 56.

The provisions in sections twelve and ten of the Federal Control Act eliminate all of the dangers stated by Miller, J., in Goodman *vs.* Niblack, 102 U. S. 566, as liable to happen if assignment were permitted. Here there is no depletion of United States Treasury, no warrant upon the Treasury, but a determination of a legal liability under the act of Congress in a court of competent jurisdiction, and the payment, if made, is made without appropriation from the Treasury, but from the funds in the hands of the carrier.

Under the law in Massachusetts, the assignee of a non-negotiable chose in action which has been assigned in writing may maintain an action thereon in his own name, but subject to all defenses and rights of counter-claim recoupe-

ment or set-off which the defendant would have been entitled had the action been brought in the name of the assignor.

Gen. Laws, chapter 231, Section 5.

This court, in an action arising under the Federal Employers Liability Act, stated:

> "We see no reason why it should be supposed to have excluded ordinary incidents of state procedure. We presume that it would not be contended that the Employers Liability Act prevented the assignment of a judgment under it in such form as was allowed by the Law of Minnesota, or that it allowed the defendant to disregard such assignment after notice. Nor do we perceive any different rules for an assignment of judgment or cause of action by way of security, which, under the Minnesota Statutes, contracts with Holloway brought to pass."
>
> Holmes, J., in Dickinson *vs.* Stiles, 246 U. S. 631.

Under these circumstances, the United States consented to be proceeded against.

Davis *vs.* Donovan, 265 U. S. 257.

Under the Feneral Control Act, the Director General and the United States were made liable to the persons injured by the negligence of the Director General or his agents in the operation of the carriers.

Mo. Pac. R. Co. *vs.* Ault., 256 U. S. 554.

Alabama, etc., R. R. Co. *vs.* Journey, 257 U. S. 111.

Dahn *vs.* Davis, 258 U. S. 421.

North Carolina R. R. Co. *vs.* Lee, 260 U. S. 16.

Davis *vs.* Dantzler Lumber Co., 261 U. S. 280.

Wabash Ry. *vs.* Elliot, 261 U. S. 457.

Director General *vs.* Kastenbaum, 263 U. S. 25.
Seymour *vs.* Director General, 290 Fed. 291.
Boswick *vs.* Director General, 220 Michigan 21.
Standard Oil Co. *vs.* Payne, 220 Mich. 663.
Davis *vs.* Wolfe, 263 U. S. 239.
Davis *vs.* Slocum, 263 U. S. 158.
Vicksburg, S. & P. Co. *vs.* Anderson Tulley Co., 256 U. S. 408.
Hudson *vs.* Davis, 289 Fed: 943.
Manbur Coal Co. *vs.* Davis, 297 Fed. 24.
Davis *vs.* McCree, 299 Fed. 142.
Davis *vs.* Michigan Trust Co., 2 Fed. (2d) 194.

The construction of section 206 of the Transportation Act for which the petitioner here contends, namely, that it permitted the substitution of the agent designated by the President only in suits properly brought and pending at the termination of Federal control, it is respectfully submitted, is not warranted by the clear comprehensive language of the act and with the purpose of the act to settle all matters arising out of the operation of Federal control all through this country. This, it is submitted, is clearly shown by the passage of the Winslow Act, amending Transportation Act, Section 206.

Davis *vs.* Lewis, 288 Fed. 704.

The precise question under the claim that the assignment was null and void has been passed upon in the following cases and decided in favor of the respondent:

Paradine, L. & L. Stock Co. *vs.* Davis, 60 Utah, 189.
Morgan *vs* Hines, 65 Montana, 306.
Parrinton *vs.* Davis, 285 Fed. 741.

Goodwin Preserving Co. *vs.* Davis, 258 Southwestern 97.

Mechanics B. & Tr. Co. *vs.* Knoxville, S. & E. Ry. Co., 148 Tenn. 113.

The petitioner relies upon the case of Davis *vs.* I. L. Cohen & Co., Inc., decided in this court June 8, 1925, and reported in Adv. Ops., 69 L. Ed. 702.

The respondent submits that the decision in that case does not settle the questions involved in the case at bar. The one question in the Cohen case which bears upon the present case is the decision that the substitution could not be made after the time named in the Transportation Act, in 206 (A), had expired.

In the case at bar the substitution was made and the appearance for the petitioner in the court below was made February 13, 1922. Record, page 6.

The court in its opinion apparently relies upon Davis *vs.* Chrisp, 159 Ark. 395; Fahey *vs.* Davis, 224 Mich. 371; Fischer *vs.* Wabash R. Co., 235 N. Y. 568; Currie *vs.* Louisville & N. R. Co., 206 Ala. 402, and Davis *vs.* Industrial Commission, 350 Ill. 341.

There are marked differences between the five cases above and the case at bar.

In the Arkansas case, which was a claim under the Federal Employers' Liability Act, the action was brought against the railroad company four years after the cause of action accrued, and under that act the claim must be commenced within two years from the day the cause of action accrued, and the court further says in that case that the provision in the Transportation Act has no application under the Federal Employers' Liability Act, and that the Court was follow-

ing the previous decision of the Court under the Arkansas Statutes of Amendment. In Fahey *vs.* Davis, the claim was also under the Federal Employers' Liability Act, and that suit was not commenced within two years from the time the cause of action arose. In Fisher *vs.* Wabash Railway Co. the question whether the substitution of James P. Davis introduced a new party was not answered at all by the Court of Appeals in New York, and it further appears that the substitution attempted was too late under the terms of the Transportation Act.

The case of Currie *vs.* Louisville Railroad was decided under the Statutes of Amendment in Alabama, and the court in its opinion says that the amendment proposed would offend our amendment law.

In Davis *vs.* Industrial Commission the motion to amend was too late under the terms of the Transportation Act. In no one of the above cases was the Winslow Act called to the attention of the court, and the court has made no decision as to the effect that the Winslow Act has upon the case at bar.

Where the Winslow Act has been brought to the attention of the court the decision of the court has been in favor of the respondent herein.

Davis *vs.* Preston, 264 S. W. 331.
Kilgore *vs.* Hines, 265 S. W. 944.
McDaniel *vs.* Davis, 266 S. W. 710.
Davis *vs.* Lewis, 288 Fed. 704.

The respondent respectfully submits that the judgment of the Court below should be affirmed.

By His Attorneys, JOHN W. KEITH,
BENJAMIN RABALSKY.

SUPREME COURT OF THE UNITED STATES.

No. 223.—October Term, 1925.

Andrew W. Mellon, Agent, etc., *vs.* Abraham Weiss, Administrator, etc.	On Writ of Certiorari to the Municipal Court of the City of Boston, Massachusetts.

[April 12, 1926.]

Mr. Justice Brandeis delivered the opinion of the Court.

In November, 1918, while the New York, New Haven & Hartford Railroad was under federal control, a bale of rags was received for shipment to Louis Cutler, the owner. The reasonable time for delivery expired in December, 1918. The rags were never delivered. Cutler assigned his claim for damages to Nominsky. In May, 1919, the latter commenced this action thereon in a state court of Massachusetts. Because he named the Railroad Company as sole defendant, the action was dismissed by the trial court. In June, 1921, that judgment was affirmed by the Supreme Judicial Court. *Nominsky* v. *New York, New Haven & Hartford R. R. Co.*, 239 Mass. 254. See *Missouri Pacific R. R. Co.* v. *Ault*, 256 U. S. 554. In January, 1922, the writ and declaration were, by leave of the trial court, amended under § 206(a), Transportation Act, 1920, c. 91, 41 Stat. 456, 461, by substituting as defendant Davis, Agent and Director General. The summons was immediately served upon him. Later, Nominsky died. Weiss, his administrator, was substituted as plaintiff.

Davis, appearing specially to object to the jurisdiction of the court over him, asked that the suit be dismissed. Without waiving that objection, he asked for judgment upon the following among other grounds. The shipment had been made on an order bill of lading which provided that: "Suits for loss, damage, or delay shall be instituted only within two years and one day after delivery of the property, or, in case of failure to make delivery, then within two years and one day after a rea-

sonable time for delivery has elapsed." Davis claimed that, although the substitution of him as defendant was made within two years from the termination of federal control, the action was barred by the bill of lading, because the substitution was not made until after two years and one day from the lapse of the reasonable time for delivery. The objection was overruled by the trial court; and it entered judgment for the plaintiff. The Appellate Division ordered judgment for the defendant. The Supreme Judicial Court reversed that order and directed the trial court to enter judgment for the plaintiff. *Weiss* v. *Director General of Railroads*, 250 Mass. 12. This Court granted a writ of certiorari, 267 U. S. 588, on January 26, 1925.

Since then, *Davis* v. *L. L. Cohen & Co., Inc.*, 268 U. S. 638, 640, 642, has settled that a suit against a railroad company is not a suit against the Director General; that § 206(d) of Transportation Act, 1920, authorized substitution of the designated Agent as defendant only in a suit which had been brought during federal control against the Director General; and that in a suit against a railroad company pending at the termination of federal control an amendment of the writ and declaration by substituting as defendant the designated Agent is to be deemed the commencement of a new and independent proceeding to enforce the liability of the Government. Applying that rule, there was in the case at bar no suit to enforce the Government's liability pending at the termination of federal control. The order substituting the Agent was not made until more than two years and a day after the cause of action arose; and as such an order of substitution is held to be the commencement of a new and independent proceeding, it follows that the suit is barred by the terms of the bill of lading.

Other objections made by the defendant to the action of the state court need not be considered.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.